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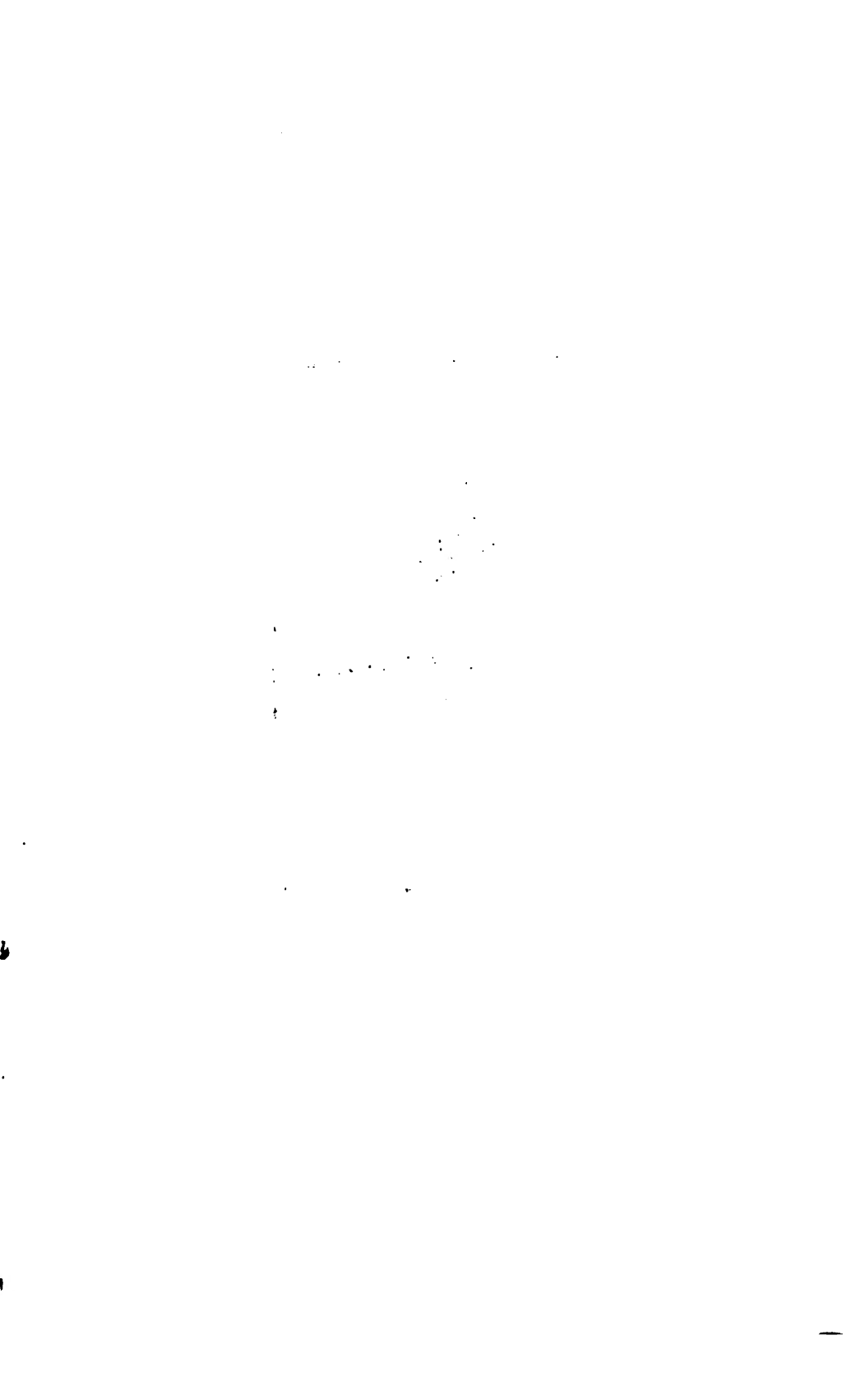
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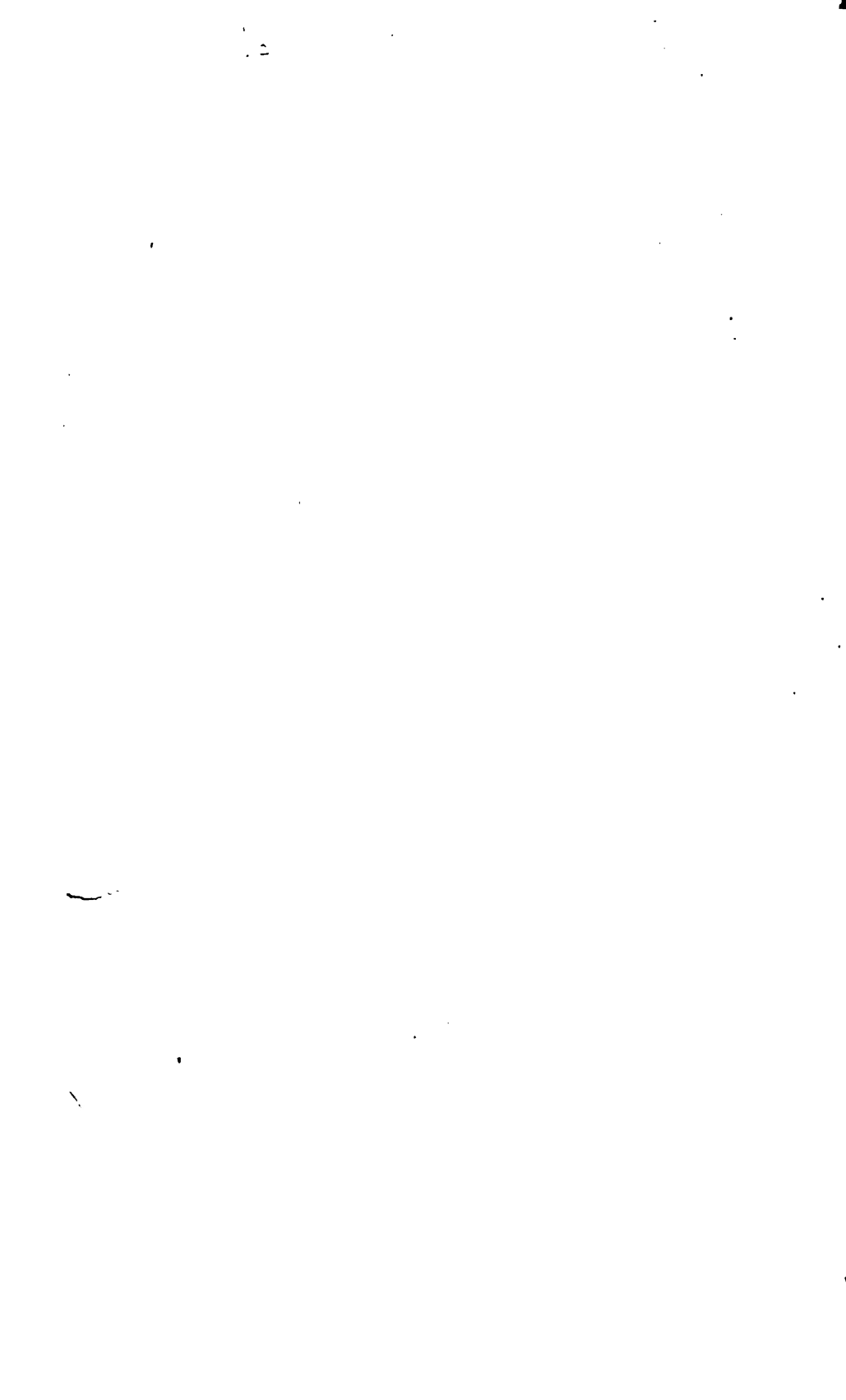


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VOL. 101—N. Y. COURT OF APPEALS.

9	195	387	526
101 ¹ 194	106 ⁶ 618	120 ¹ 266	101 ¹ 546
102 ¹ 58	136 ⁴ 009	120 ¹ 505	102 ¹ 118
19	205	108 ² 298	102 ¹ 119
115 ² 487	101 ¹ 276	116 ² 288	105 ² 675
25	184 ¹ 472	391	126 ² 644
108 ⁴ 24	148 ² 289	104 ¹ 866	133 ⁵ 570
108 ⁴ 25	107 ³ 669	d104 ¹ 477	539
108 ⁶ 30	118 ³ 541	108 ¹ 214	102 ² 118
127 ⁴ 13	118 ³ 542	115 ¹ 59	102 ² 119
130 ¹ 99	118 ³ 594	115 ¹ 61	547
61	142 ¹ 188	182 ¹ 506	103 ¹ 328
112 ¹ 286	226	108 ² 216	112 ¹ 227
² 285	103 ¹ 128	119 ² 225	123 ² 4
d144 ² 83	124 ¹ 887	396	126 ² 110
s101 ⁶ 16	125 ¹ 560	103 ² 318	128 ² 574
58	234	d103 ² 328	554
127 ² 491	110 ¹ 306	106 ² 518	134 ¹ 449
135 ⁴ 562	d121 ² 116	132 ² 278	s114 ⁴ 183
71	240	401	568
137 ² 345	103 ¹ 541	141 ¹ 875	124 ¹ 381
108 ⁴ 597	111 ¹ 336	146 ¹ 208	119 ⁵ 202
77	122 ¹ 602	411	580
110 ⁵ 42	130 ¹ 405	134 ¹ 534	d114 ³ 16
131 ² 13	135 ¹ 463	d139 ² 408	132 ⁴ 181
83	144 ¹ 498	419	110 ⁵ 347
114 ⁴ 326	119 ² 560	104 ² 657	128 ³ 316
88	120 ² 865	124 ² 419	586
102 ¹ 112	d125 ² 629	106 ² 891	118 ¹ 446
128 ¹ 144	120 ² 189	d106 ⁴ 375	s139 ⁵ 298
130 ¹ 863	245	427	591
122 ² 26	d107 ⁶ 10	140 ⁵ 286	144 ⁶ 88
122 ² 34	143 ¹ 223	434	602
124 ² 608	s113 ² 481	130 ¹ 500	142 ¹ 399
134 ² 162	254	439	607
135 ² 411	107 ¹ 368	L119 ¹ 485	121 ² 12
d136 ² 531	127 ¹ 599	442	610
104 ² 294	265	109 ² 491	126 ² 179
104 ⁵ 569	105 ¹ 18	451	b 616
108 ⁵ 185	105 ¹ 19	124 ¹ 203	118 ² 265
108 ⁵ 414	124 ⁴ 54	458	118 ² 266
112 ⁵ 188	270	122 ² 81	131 ¹ 77
114 ⁵ 488	118 ⁵ 41	127 ² 140	a 625
118 ⁵ 410	284	478	124 ² 255
119 ⁶ 604	121 ¹ 18	124 ² 838	c 625
120 ² 286	135 ² 468	143 ² 263	132 ⁴ 486
121 ² 124	146 ² 248	487	b 632
128 ² 148	294	d127 ¹ 497	131 ³ 329
128 ² 169	s135 ⁴ 463	133 ¹ 61	c 634
128 ² 444	s101 ⁶ 34	490	103 ³ 399
d132 ² 360	303	L108 ⁴ 509	106 ² 297
128 ⁶ 146	142 ¹ 595	498	106 ³ 323
105 ⁵ 508	143 ² 347	138 ² 860	109 ⁴ 406
125 ⁵ 394	307	102 ³ 278	145 ¹ 109
d133 ⁵ 82	124 ² 145	129 ³ 244	b 638
136	311	504	127 ¹ 140
134 ⁴ 162	136 ³ 392	116 ¹ 491	c 639
116 ⁵ 228	322	114 ³ 556	114 ¹ 101
146	s101 ⁶ 38	105 ⁴ 482	a 640
115 ¹ 220	328	105 ⁴ 484	132 ² 407
117 ¹ 124	103 ¹ 272	105 ⁴ 488	661
130 ¹ 287	109 ⁶ 429	520	105 ⁵ 209
115 ² 244	117 ⁶ 459	105 ¹ 600	133 ⁶ 559
173	348	132 ¹ 234	140 ³ 319
138 ² 218	111 ¹ 566	134 ¹ 193	c 669
176	141 ¹ 545	142 ¹ 34	143 ³ 527
106 ² 277	124 ² 536	103 ² 318	690
179	127 ² 876	103 ² 328	103 ⁴ 497
109 ² 11	362		109 ⁵ 352
126 ² 686	130 ¹ 495		
188	373		
113 ¹ 110	131 ¹ 145		
	134 ¹ 268		



Vol. 101. NEW YORK REPORTS.

N. B.—Cut out and stick each block on page at its head, or citations for entire volume on inside front cover.

Always consult this table before using a case.

5:59 Fed 998	136:155 Mas 67	311:37 Fed 752	411:43 NJE 359	554:84 Fed 425
9:49 NJL 496	69 Con 678	7 LRA 390n	8 LRA 59n	58 NJE 270
19:9 LRA 855n	1 LRA 297n	9 LRA 247n	11 LRA 750n	15 LRA 350n
10 LRA 242n	5 LRA 126n	322:53 NJL 216	14 LRA 371n	30 LRA 239
	8 LRA 123n	15 LRA 300	26 LRA 663n	35 LRA 650n
23:154 Mas 294	17 LRA 224	322:68 Fed 258	26 LRA 624n	563:45 NJE 551
11 LRA 445n	146:5 LRA 454	10 LRA 666	34 LRA 772	7 LRA 490n
12 LRA 50n	5 LRA 796n	30 LRA 35n	419:46 Fed 563	15 LRA 135n
13 LRA 281	14 LRA 401	344:17 LRA 346n	3 LRA 743n	575:17 LRA 587
14 LRA 222	26 LRA 199n	362:126 US 255	6 LRA 214n	22 LRA 773n
16 LRA 496n	167:4 LRA 218n	34 LRA 424	11 LRA 677	590:150 US 300
19 LRA 814n	5 LRA 166n	347:35 LRA 390n	434:2 LRA 346n	37 LRA 1069
40 LRA 294	9 LRA 793n	10 LRA 560n	15 LRA 217	1 LRA 272
45:68 Fed 241	173:20 LRA 121	26 LRA 637	458:9 LRA 549	10 LRA 530n
51:46 Fed 743	179:4 LRA 240n	28 LRA 409	469:66 Fed 245	31 LRA 603
5 LRA 65n	188:49 NJL 496	32 LRA 176	12 LRA 121n	536:14 LRA 156n
5 LRA 688n	2 LRA 793	367:3 LRA 734n	478:2 LRA 550n	561:4 LRA 504n
8 LRA 91n	195:1 LRA 636n	373:15 LRA 242	11 LRA 432	595:25 LRA 831n
12 LRA 679	205:139 US 209	17 LRA 770	487:23 Fed 749	607:4 LRA 798n
26 LRA 381	35 LRA 151	377:32 Fed 179	490:134 US 644	616:14 LRA 498n
38 LRA 614	55 Fed 453	159 Mas 574	33 LRA 1080	631:12 LRA 321n
58:60 Con 312	59 Con 233	7 LRA 502n	498:21 LRA 212	634:1 LRA 56
4 LRA 203n	18 LRA 320	8 LRA 464n	504:9 LRA 414n	5 LRA 561n
12 LRA 791n	18 LRA 327	9 LRA 829n	11 LRA 487n	11 LRA 533n
13 LRA 739	226:9 LRA 647n	9 LRA 604n	23 LRA 171n	26 LRA 164
33 LRA 410	31 LRA 610n	39 LRA 699n	36 LRA 383n	39 LRA 299
63:152 Mas 37	234:1 LRA 230	387:36 Fed 417	511:5 LRA 375n	636:38 LRA 98n
54 Con 381	4 LRA 35n	1 LRA 647	520:152 US 152	638:3 LRA 797n
13 LRA 788	240:121 US 550	5 LRA 274n	38 LRA 295	640:37 LRA 815
77:15 LRA 690	30 LRA 1003	5 LRA 555	156 Mas 202	641:21 LRA 507n
82:3 LRA 778n	4 LRA 300n	5 LRA 763n	168 Mas 411	644:58 NJL 61
18 LRA 368n	245:75 Fed 975	8 LRA 592	1 LRA 174n	649:26 LRA 385n
98:151 Mas 50	48 NJE 106	9 LRA 192	4 LRA 58n	661:7 LRA 131n
51 NJE 223	254:1 LRA 178n	17 LRA 207n	12 LRA 244n	8 LRA 174n
4 LRA 573n	8 LRA 390n	391:147 Mas 68	526:8 LRA 228n	15 LRA 33n
6 LRA 304n	14 LRA 559n	156 Mas 428	13 LRA 177n	34 LRA 125
7 LRA 437	14 LRA 744	1 LRA 699n	24 LRA 62	663:2 LRA 812n
8 LRA 174	257:13 LRA 236n	4 LRA 796n	539:13 LRA 173n	667:10 LRA 179n
9 LRA 717	265:12 LRA 149	5 LRA 581n	547:144 Mas 205	21 LRA 277n
13 LRA 404	30 LRA 554	6 LRA 193	144 Mas 237	573:3 LRA 799n
13 LRA 732	270:1 LRA 842n	16 LRA 642	146 Mas 595	574:9 LRA 414n
14 LRA 138	277:3 LRA 171n	17 LRA 702	1 LRA 699n	9 LRA 648n
14 LRA 372n	7 LRA 81n	22 LRA 205	4 LRA 53n	29 LRA 685n
14 LRA 464	8 LRA 77n	396:56 Fed 932	4 LRA 796n	577:30 LRA 43n
15 LRA 619	26 LRA 856n	69 Fed 929	4 LRA 850n	578:19 LRA 317n
17 LRA 224	284:10 LRA 373	57 NJL 100	6 LRA 76n	685:61 Con 455
17 LRA 680	284:1 LRA 362n	1 LRA 174n	22 LRA 295	3 LRA 565
18 LRA 362	25 LRA 843	4 LRA 52n	32 LRA 399	690:19 LRA 77
18 LRA 769	303:25 LRA 547n	401:45 Fed 334	32 LRA 438	
19 LRA 810				
20 LRA 755n				
24 LRA 614				
25 LRA 169				
132:1 LRA 169n				

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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

FROM AND INCLUDING THE DECISIONS OF DECEMBER 8, 1885, TO AND INCLUDING DECISIONS OF MARCH 23, 1886.

WITH

NOTES, REFERENCES AND INDEX.

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GEORGE F. DANFORTH,

FRANCIS M. FINCH,

ASSOCIATE JUDGES.



TABLE OF CASES

A.

PAGE.

PAGE

TABLE OF CASES REPORTED.

vii

	PAGE		PAGE
<i>Deen v. Milne, Ex'r, etc.</i>	682	<i>Fitzpatrick, Forty-second St. and</i>	
<i>De Freeze et al. v. City of Troy.</i>	608	<i>Grand St. R. R. Co.</i>	646
<i>D. L. & W. R. R. Co., Pease v.</i>	367	<i>Fitzpatrick v. N. Y. & M. B. R.</i>	
<i>De Lude, Ackerman et al. v.</i>	641	<i>Co.</i>	617
<i>Demming v. Parrott</i>	625	<i>Flagg v. Manhattan R. Co.</i>	624
<i>Denman et al. v. McGuire,</i>		<i>Flint v. Bell.</i>	688
<i>Impl'd, etc.</i>	161	<i>Flushing Ave., L. I. City, In re</i>	
<i>Dimock et al., Favor v</i>	674	<i>Opening, etc.</i>	678
<i>Dingee v. N. Y. C. & H. R. R.</i>		<i>Forty second St and Grand St.</i>	
<i>R. Co.</i>	643	<i>R. R. Co., Fitzpatrick v.</i>	646
<i>Dix et al., Second Nat. Bk.</i>		<i>Foster, Chapin v</i>	1
<i>Patterson, N. J., v.</i>	684	<i>Fowler et al., Michelson v</i>	633
<i>Donovan, People v</i>	632	<i>Friedman, Kent et al. v.</i>	616
<i>Doughty et al. v. Manhattan</i>		<i>Frith et al., McColl v</i>	677
<i>Brass Co.</i>	644	<i>Fuller Electrical Co. v. Lewis</i>	
<i>Douling v. Clift.</i>	673	<i>et al.</i>	674
<i>Duffy v. N. Y. & M. B. R. Co.</i>	632	<i>Fuller, Styles v.,</i>	622
<i>Duplex Safety Boiler Co. v.</i>			
<i>Garden et al.</i>	887	G.	
<i>Durant v. Abendroth, Impl'd,</i>		<i>Garden et al., Duplex Safety</i>	
<i>etc.</i>	641	<i>Boiler Co. v.</i>	387
<i>Dwight et al., Bd. Water Com'rs</i>		<i>Gardner v. Mead</i>	655
<i>Village of Clinton v</i>	9	<i>Geer, Kelly et al. v.</i>	664
		<i>Germania Nat. Bk. of New</i>	
E.		<i>Orleans v. Taaks et al.</i>	442
<i>Erie Co. Sav'gs Bk., Harrington</i>		<i>Gray, Griffin v.</i>	669
<i>v</i>	257	<i>Greany v. L. I. R. R. Co.</i>	419
<i>Evans et al. v. Backer et al.</i>	289	<i>Greeff et al., Newman v.</i>	663
<i>Evans, People, ex rel. v. Chapin,</i>		<i>Greenwich Ins. Co., Clover v.</i> ..	277
<i>Compt'r.</i>	682	<i>Griffin v. Gray</i>	660
<i>Evening Post Publishing Co.,</i>		<i>Griffin, Rec'r, etc. v. L. I. R.</i>	
<i>Ball v.</i>	641	<i>R. Co.</i>	348
		<i>Griffin v. Otis.</i>	669
F.		<i>Guion, Snowden et al. v.</i>	458
<i>Farquharson, Linderman v.</i>	434		
<i>Farthing et al., White's Bk.</i>		H.	
<i>Buffalo et al. v</i>	344	<i>Hall v. Chandler</i>	615
<i>Favor v. Dimock et al.</i>	674	<i>Hammond v. Morgan</i>	179
<i>Fay et al. v. Lynch, Impl'd, etc.</i>	643	<i>Harrington v. Erie Co. Sav'gs</i>	
<i>Fielding et al., Royer Wheel Co.</i>		<i>Bk.</i>	257
<i>v</i>	504	<i>Havens, Simmons v.</i>	427
<i>Fitzgerald, Merritt et al. v.</i>	687	<i>Hawley, Preston v.</i>	586
		<i>Hays et al., Simonton et al. v.</i> ..	687

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
<i>Hebberd, Baxter v</i>	654	<i>Kelsch, Hosford v</i>	653
<i>Heuertematte v. Morris</i>	63	<i>Kendall, Childs et al. v</i>	625
<i>Hexamer v. Webb</i>	377	<i>Kennedy v. N. Y. L. Ins. & Tr.</i>	
<i>Hildreth v. City of Troy</i>	234	<i>Co.</i>	487
<i>Hills v. Peekskill Sav'gs Bk.</i>		<i>Kent et al., Carpenter et al. v.</i>	591
<i>et al.</i>	490	<i>Kent et al. v. Friedman</i>	616
<i>Holbrook et al., Schenectady</i>		<i>Kerosene Lamp Heater Co. v.</i>	
<i>Stove Co. v</i>	45	<i>Rathbone et al.</i>	615
<i>Holman et al., Ex'rs, etc., Price v.</i>	683	<i>Kiernan, People v</i>	618
<i>Horwitz et al., Materne et al. v.</i>	469	<i>Kilpatrick et al., Impl'd, etc.,</i>	
<i>Hosford v. Kelsch</i>	653	<i>Wolf v</i>	146
<i>House, Lockwood v.</i>	647	<i>Kings Co. Fire Ins. Co. v. Ste-</i>	
<i>Hunt, In re, People v. Knick. L.</i>		<i>vens</i>	411
<i>Ins. Co.</i>	636	<i>Kingston, Com. Council of, Peo-</i>	
<i>Hussen v. Oppenheim</i>	673	<i>ple, ex rel. Sup'rs Ulster, v.</i>	82
<i>Hyatt v. Tice et al.</i>	654	<i>Knaust, In re to vacate assm't.</i>	188
		<i>Knick. Life Ins. Co., People, v.</i>	
I.		<i>(In re Hunt)</i>	636
<i>In re Butler</i>	307	<i>Knight et al. v. N. Y. & M. B.</i>	
<i>In re Cluff</i>	624	<i>R. Co., Impl'd, etc.</i>	660
<i>In re Flushing Ave., L. I. City.</i>	678	<i>Koch, Man. & Tr. Bk. of Buf-</i>	
<i>In re Hunt, People v. Knick. L.</i>		<i>alo, v.</i>	640
<i>Ins. Co.</i>	636	L.	
<i>In re Knaust</i>	188	<i>Lake v. N. Y. C. & H. R. R.</i>	
<i>In re Maurer</i>	648	<i>R. Co.</i>	660
<i>In re N. Y., W. S. & B. R. Co.,</i>		<i>Lane v. Wheeler</i>	17
<i>to acquire title to lands.</i>	685	<i>Larmore v. Crown Point Iron</i>	
<i>In re Otis, Ex'rs, etc., et al.</i> ..	580	<i>Co.</i>	391
<i>In re Riverside Park Opening.</i> ..	624	<i>Levy et al., Bach et al. v.</i>	511
<i>In re Surrogate's Books, West-</i>		<i>Lewis et al., Fuller Electrical</i>	
<i>chester Co.</i>	655	<i>Co. v</i>	674
<i>In re Staten Island R. T. R. R.</i>		<i>Linderman v. Farquharson</i>	434
<i>Co., to acquire title to lands.</i> ..	636	<i>Livingston et al., Phoenix et al.,</i>	
J.		<i>Trustees, etc., v.</i>	451
<i>Jackson et al. v. Tupper et al.</i> ..	515	<i>Lockwood v. House</i>	647
<i>Jefferson v. People</i>	19	<i>London, Assurance Corporation</i>	
<i>Jenkins, Cassidy v</i>	653	<i>of, O'Reilly v</i>	575
<i>Joyce v. Spafard</i>	657	<i>Longendyke et al. v. Anderson.</i>	625
		<i>L. I. City, In re opening Flush-</i>	
K.		<i>ing Ave.</i>	678
<i>Keator et al., Ass'rs, etc., People,</i>		<i>L. I. City, Moran v.</i>	439
<i>ex rel. W. V. R. R. Co., v.</i> ..	610	<i>L. I. R. R. Co., Greany v</i>	419
<i>Kelly et al. v. Geer</i>	664	<i>L. I. R. R. Co., Griffin, Rec'r,</i>	
		<i>etc. v.</i>	348

TABLE OF CASES REPORTED.

ix

PAGE.	PAGE.
<i>Lord v. Yonkers Fuel Gas Co.</i>	<i>Matter of Riverside Park opening</i> 624
<i>et al.</i> 614	<i>Matter of Surrogate's Books of</i>
<i>Loring, Ex'r, etc. v. Binney et al.</i> 623	<i>Westchester Co.</i> 655
<i>Lynch, Impl'd, etc., Fay et al. v.</i> 643	<i>Matter of Staten Island R. T. R.</i>
	<i>R. Co.</i> 636
M.	<i>Maurer, In re</i> 648
<i>McCarthy v. Bonynge</i> 668	<i>Mazwell et al., Shuler v.</i> 657
<i>McColl v. Frith et al.</i> 677	<i>Mayer v. Mayor, etc., of N. Y.</i> 284
<i>McConnell, Reed v.</i> 270	<i>Mayor, etc., of N. Y., Carleton v.</i> 668
<i>McGinnis et al. v. Smythe</i> 646	<i>Mayor, etc., of N. Y., Mayer v.</i> 284
<i>McGuire, Impl'd, etc., Denman</i>	<i>Meade, Gardner v.</i> 655
<i>et al. v.</i> 161	<i>Mer. Nat. Bk. of N. Y. v.</i>
<i>McNider, Pope et al. v.</i> 687	<i>Sheehan, Impl'd, etc.</i> 176
<i>Mac Lean, Nichols, Adm'rx, etc.,</i>	<i>Merrick et al., Thorington et</i>
<i>v.</i> 526	<i>al. v.</i> 5
<i>Main, Dale v.</i> 634	<i>Merritt et al. v. Fitzgerald.</i> ... 687
<i>Maloney v. B'klyn City R. R.</i>	<i>Merritt v. Village of Port Ches-</i>
<i>Co.</i> 642	<i>ter</i> 634
<i>Manhattan Brass Co., Doughty</i>	<i>Michelson v. Fowler et al.</i> 633
<i>et al. v.</i> 644	<i>Midas, Rheinstrom v.</i> 635
<i>Manhattan R. Co., Flagg v.</i> 624	<i>Middletown, Village of, Allison v.</i> 667
<i>Manhattan R. Co., Searles v.</i> 661	<i>Milne, Ex'r, etc., Deen v.</i> 682
<i>Man. & Tr. Bk. of Buffalo v.</i>	<i>Monty v. Bloomingdale</i> 617
<i>Koch</i> 640	<i>Moran v. L. I. City</i> 439
<i>Marsh v. Chickering et al.</i> 396	<i>Morgan, Hammond v.</i> 179
<i>Marsh v. Masterton</i> 401	<i>Morris, Heuertematte v.</i> 63
<i>Martin v. Rector.</i> 77	<i>Munsell, People, ex rel. v. Court</i>
<i>Martin et al. v. Tradesmen's Ins.</i>	<i>of Oyer & Terminer of N. Y.</i> 245
<i>Co.</i> 498	<i>Murphy, People v.</i> 126
<i>Marvel, Stewart et al. v.</i> 357	<i>Mut. L. Ins. Co. of N. Y. v.</i>
<i>Masten v. Olcott et al.</i> 182	<i>Schwaner et al.</i> 681
<i>Masterton, Marsh v.</i> 401	
<i>Materne et al. v. Horwitz et al.</i> 469	
<i>Matter of Butler</i> 307	N.
<i>Matter of Oluff</i> 624	
<i>Matter of Flushing Ave., L. I.</i>	<i>Nat. City Bk. v. N. Y. Gold</i>
<i>City.</i> 678	<i>Exch. Bk.</i> 595
<i>Matter of Hunt, People v. Knick.</i>	<i>Nelson et al. v. Purdy et al.</i> 634
<i>L. Ins. Co.</i> 636	<i>Neubauer v. N. Y., L. E. & W.</i>
<i>Matter of Knaust</i> 188	<i>R. R. Co.</i> 607
<i>Matter of Maurer</i> 648	<i>Newman v. Greeff et al.</i> 663
<i>Matter of N. Y., W. S. & B. R.</i>	<i>Newman v. Reynolds</i> 656
<i>Co.</i> 685	<i>N. Y. Catholic Protect'y, People,</i>
<i>Matter of Otis, Ex'x, etc., et al.</i> 580	<i>ex rel. Van Heck, v.</i> 195

TABLE OF CASES REPORTED.

PAGE.	PAGE.
<i>N. Y. C. & H. R. R. R. Co., Dingee v.</i> 643	<i>O'Reilly v. Corporation of Lon- don Assurance.</i> 575
<i>N. Y. C. & H. R. R. R. Co., Lake v.</i> 660	<i>Olcott et al., Masten v.</i> 152
<i>N. Y. C. & H. R. R. R. Co., Ulinc v.</i> 98	<i>Oneida Co. Bk. v. Bonney et al.</i> 173
<i>N. Y., Com'rs of Taxes, etc., People, ex rel. N. Y. & H. R. R. Co., v.</i> 322	<i>Oppenheim, Hussen v.</i> 673
<i>N. Y., Com'rs of Taxes, etc., People, ex rel. N. Y. & H. R. R. Co., v.</i> 638	<i>Oslander v. Weber et al.</i> 639
<i>N. Y., Com'rs of Taxes, etc., People, ex rel. Smith, v.</i> 651	<i>Otis, Griffin v.</i> 669
<i>N. Y. Gold Exch. Bk., Nat. City Bk. v.</i> 595	<i>Otis, In re</i> 580
<i>N. Y. & H. R. R. Co., People, ex rel. v. Com'rs of Taxes, eto.</i> 822	<i>Otto, People v.</i> 690
<i>N. Y. & H. R. R. Co., People, ex rel. v. Com'rs of Taxes, etc.</i> 638	
<i>N. Y. L. E. & W. R. R. Co., Neubauer v.</i> 607	
<i>N. Y. L. Ins. Co., Bogardus v.</i> 328	
<i>N. Y. L. Ins. & Tr. Co. Kennedy v.</i> 487	
<i>N. Y. & M. B. R. Co., Duffy v.</i> 632	
<i>N. Y. & M. B. R. Co., Fitz- patrick v.</i> 617	
<i>N. Y. & M. B. R. Co., Impl'd, etc., Knight et al. v.</i> 660	
<i>N. Y., Mayor, etc., Carleton v.</i> 668	
<i>N. Y., Mayor, etc., Mayer v.</i> 284	
<i>N. Y., W. S. & B. R. Co., In re Appl'n to acquire lands ...</i> 685	
<i>N. Y., W. S. & B. R. Co. et al., U. S. Trust Co. of N. Y. v.</i> 478	
<i>Nichols, Adm'rx, etc. v. Mac- Lean.</i> 526	
<i>Nolan, People, ex rel. Swin- burne, v.</i> 539	
O.	
<i>O'Dea v. O'Dea.</i> 23	
	<i>P.</i>
	<i>Pabst et al., Belgian Glass Co. v.</i> 621
	<i>Parrott, Demming v.</i> 625
	<i>Pease v. D. L. & W. R. R. Co.</i> 367
	<i>Peekskill Sav'gs Bk. et al., Hills v.</i> 490
	<i>People v. Cipperly.</i> 634
	<i>People v. Donovan.</i> 632
	<i>People, Jefferson v.</i> 19
	<i>People v. Kiernan.</i> 618
	<i>People v. Knick. L. Ins. Co., In re Hunt.</i> 636
	<i>People v. Murphy.</i> 126
	<i>People v. Otto.</i> 690
	<i>People v. Phillips et al.</i> 639
	<i>People v. Seely.</i> 642
	<i>People v. Taylor.</i> 608
	<i>People, ex rel. B'd Sup'rs Ulster Co., v. Common Council of Kingston.</i> 82
	<i>People, ex rel. Hoans, v. Chapin, Compt'lr, etc.</i> 682
	<i>People, ex rel. Munsell, v. Ct. Oyer & Terminer, N. Y.</i> 245
	<i>People, ex rel. N. Y. & H. R. R. Co., v. Com'rs Taxes, etc., N. Y.</i> 322
	<i>People, ex rel. N. Y. & H. R. R. Co., v. Com'rs Taxes, etc., N. Y.</i> 638
	<i>People, ex rel. Smith, v. Com'rs Taxes, etc., N. Y.</i> 651
	<i>People, ex rel. Swinburne, v. Nolan.</i> 539

TABLE OF CASES REPORTED.

xi

	PAGE.		PAGE.
People, ex rel. Van Heck, v. N. Y. Catholic Protectory	195	Ridgewood Ice Co., Rector v.	656
People, ex rel. W. V. R. R. Co., v. Keator et al., Assessors, etc.	610	Riverside Park, In re opening	624
People, ex rel. Wright, v. Common Council of Buffalo	640	Roach et al., Cornell et al. v.	373
Perry v. R. W. & O. R. R. Co.	688	R., W. & O. R. R. Co., Perry v.	688
Phillips et al., People v.	639	R., W. & O. R. R. Co., Phippany v.	684
Phillips v. Taylor	639	R., W. & O. R. R. Co., Smith v.	684
Phippany, R., W. & O. R. R. Co. v.	684	Ross v. Wigg	640
Phoenix et al., Trustees, etc. v. Livingston et al.	451	Rothschild et al., Street v.	635
Phoenix Fire Ins. Co. of Hartford, Conn., Wise v.	637	Rothschild et al. v. Werner et al.	674
Pierce et al., Talcott v.	653	Royer Wheel Co. v. Fielding et al.	504
Poillon v. City of Brooklyn	132	Russell et al., Impl'd, etc., Billings v.	226
Pond et al., Catlin v.	649	Ryle v. Brown	684
Pope et al. v. McNider	687		
Port Chester, Village of, Bruecher v.	240	S.	
Port Chester, Village of, Merritt v.	634	Satterly v. Winne	218
Port Chester, Village of, et al., Tingle v.	294	Schenectady Stove Co. v. Holbrook et al.	45
Preston v. Hawley	586	Schmittler v. Simon	554
Price et al. v. Brown et al.	609	Scholl v. A. & R. I. & S. Co.	602
Price v. Brown et al., Ex'rs, etc.	683	Scholle v. Scholle et al.	167
Price v. Holman et al., Ex'rs, etc.	683	Scholle v. Scholle et al.	636
Purdy et al., Nelson et al. v.	634	Schwaneer et al., Mut. L. Ins. Co. of N. Y. v.	681
		Searles v. Man. R. Co.	661
R.		Second Nat. Bk., Paterson, N. J., v. Dix et al.	684
Rapalee, Wing v.	620	Seeley, People v.	642
Rathbone et al., Kerosene Lamp Heater Co. v.	615	Seifert v. City of B'klyn.	136
Read et al., Townsend v.	676	Sheehan, Impl'd, etc., v. Merchants' Nat. Bk., N. Y.	176
Rector, Martin v.	77	Shuler v. Maxwell et al.	657
Rector v. Ridgewood Ice Co.	656	Simmons v. Havens	427
Reed v. McConnell	270	Simon, Schmittler v.	554
Reilly, Clews et al. v.	635	Simonton et al. v. Hays et al.	687
Reynolds, Newman v.	656	Slocum et al. Veghte, Adm'r, etc., v.	642
Rheinstrom v. Midas	635	Smalley et al., Butler v.	71
Richardson, Stockwell v.	643	Smith v. Boyd et al.	472
		Smith v. B'klyn Sav'gs Bk.	58
		Smith, Cahill v.	355

	PAGE.		PAGE.
<i>Smith et al. v. City of Brooklyn.</i>	616	<i>Troy, City of, Hildreth v.</i>	234
<i>Smith, People, ex rel. v. Com'rs</i>		<i>Tupper et al., Jackson et al. v.</i>	515
<i>Taxes, etc.</i>	651		
<i>Smith, R., W. & O. R. R. Co. v.</i>	684	U.	
<i>Smythe, McGinnis et al. v.</i>	646	<i>Uhrig v. Williamsburgh City</i>	
<i>Snowden et al. v. Guion.</i>	458	<i>F. Ins. Co.</i>	362
<i>Spafard, Joyce v.</i>	657	<i>Uline v. N. Y. C. & H. R. R.</i>	
<i>Standard Oil Co., N. Y. et al.,</i>		<i>R. Co.</i>	98
<i>Buffalo L. O. Co. (Limited) v.</i>	657	<i>Ulster Co. Sup'rs, People, ex</i>	
<i>Stanton, Rec'r, etc. v. Westover</i>		<i>rel., Com. Council of King-</i>	
<i>et al.</i>	265	<i>ston, v.</i>	82
<i>Staten Island R. T. R. R. Co.,</i>		<i>Union Nat. Bk., Troy, Viets v.</i>	563
<i>In re.</i>	636	<i>Union Pac. R. R. Co., Brewer v.</i>	647
<i>Steers v. City of Brooklyn. ...</i>	51	<i>U. S. Trust Co., N. Y., v. N. Y.,</i>	
<i>Steinway & Sons, Benzing v. ...</i>	547	<i>W. S. & B. R. Co. et al.</i>	478
<i>Steuben Co. Bk. v. Alberger et</i>			
<i>al.</i>	202	V.	
<i>Stevens, Kings Co. Fire Ins.</i>		<i>Van Dolan v. Abendroth, Impl'd,</i>	
<i>Co. v.</i>	411	<i>etc.</i>	641
<i>Stewart et al. v. Marvel.</i>	357	<i>Van Heck, People, ex rel. v.</i>	
<i>Stockwell v. Richardson.</i>	643	<i>N. Y. Catholic Protectory ..</i>	195
<i>Street v. Rothschild et al.</i>	635	<i>Van Horne v. Campbell et al. .</i>	608
<i>Styles v. Fuller.</i>	622	<i>Van Nostrand et al., Dean v. ...</i>	621
<i>Surrogate Westchester Co., In</i>		<i>Veghte, Adm'r, etc. v. Slocum et</i>	
<i>re Books of.</i>	655	<i>al.</i>	642
<i>Sweeney v. B. & J. Env. Co. ...</i>	520	<i>Viets v. Un. Nat. Bk. Troy ...</i>	563
<i>Swinburne, People, ex rel. No-</i>		<i>Vil. of Clinton, Board Water</i>	
<i>lan, v.</i>	539	<i>Com'rs v. Dwight et al.</i>	9
		<i>Vil. of Middletown, Allison v. .</i>	667
T.		<i>Vil. Pt. Chester, Bruecher v. .</i>	240
<i>Taaks et al., Ger. Nat. Bk. of</i>		<i>Vil. Pt. Chester et al., Merritt v.</i>	634
<i>N. O. v.</i>	442	<i>Vil. Pt. Chester et al., Tingle v.</i>	294
<i>Talcott v. Pierce et al.</i>	653		
<i>Taylor, People v.</i>	608	W.	
<i>Taylor, Phillips v.</i>	639	<i>Wakeman et al. v. W. & W.</i>	
<i>Thorington et al. v. Merrick et</i>		<i>Man. Co.</i>	205
<i>al.</i>	5	<i>Wallace, Ex'rx, etc. v. Berdell</i>	
<i>Tice et al., Hyatt v.</i>	654	<i>et al.</i>	13
<i>Tingue v. Village of Port Ches-</i>		<i>Wallace et al., Cusper v.</i>	649
<i>ter et al.</i>	294	<i>Wallkill V. R. R. Co., People, ex</i>	
<i>Townsend v. Read et al.</i>	676	<i>rel. v. Keator et al., Assessors,</i>	
<i>Tradesmen's Ins. Co., Martin</i>		<i>etc.</i>	610
<i>et al. v.</i>	498	<i>Webb, Hexamer v.</i>	377
<i>Troy, City of, De Freese et al. v.</i>	608		

TABLE OF CASES REPORTED.

xiii

	PAGE.		PAGE.
Welsh v. Wilson	254	Wigg, Ross v.....	640
Westover et al., Stanton, Rec'r, etc. v	265	Williamsburgh City Fire Ins. Co., Uhrig v	362
Weber et al., Ostrander v.	639	Wilson, Welsh v.....	254
Werner et al., Rothschild et al. v.	674	Wing v. Rapalee.....	620
Westchester Co. Surrogate, In re Books of.....	655	Winne, Satterly v.....	218
Weston v. Chamberlain.....	677	Wise v. Phoenix F. Ins. Co., Hartford, Conn.....	637
Wharton et al., B. P. & H. Dye- ing Establishment v.	631	Wolf v. Kilpatrick et al., Impl'd, etc.	146
Wheeler, Impl'd, etc., Allendorph. v	649	Woolley et al. v. Baldwin.....	688
Wheeler, Blackman v.....	655	Wright, Coleman v.....	677
Wheeler, Lane v.....	17	Wright, People, ex rel. v. Com- mon Council of Buffalo ..	640
W. & W. Man. Co., Wakeman et al. v	205		
White's Bk. of Buffalo et al. v. Farthing et al	344		
Wigg, Chrystie et al. v.....	640		

Y.

Yonkers Fuel Gas Co. et al., Lord v.....	614
---	-----

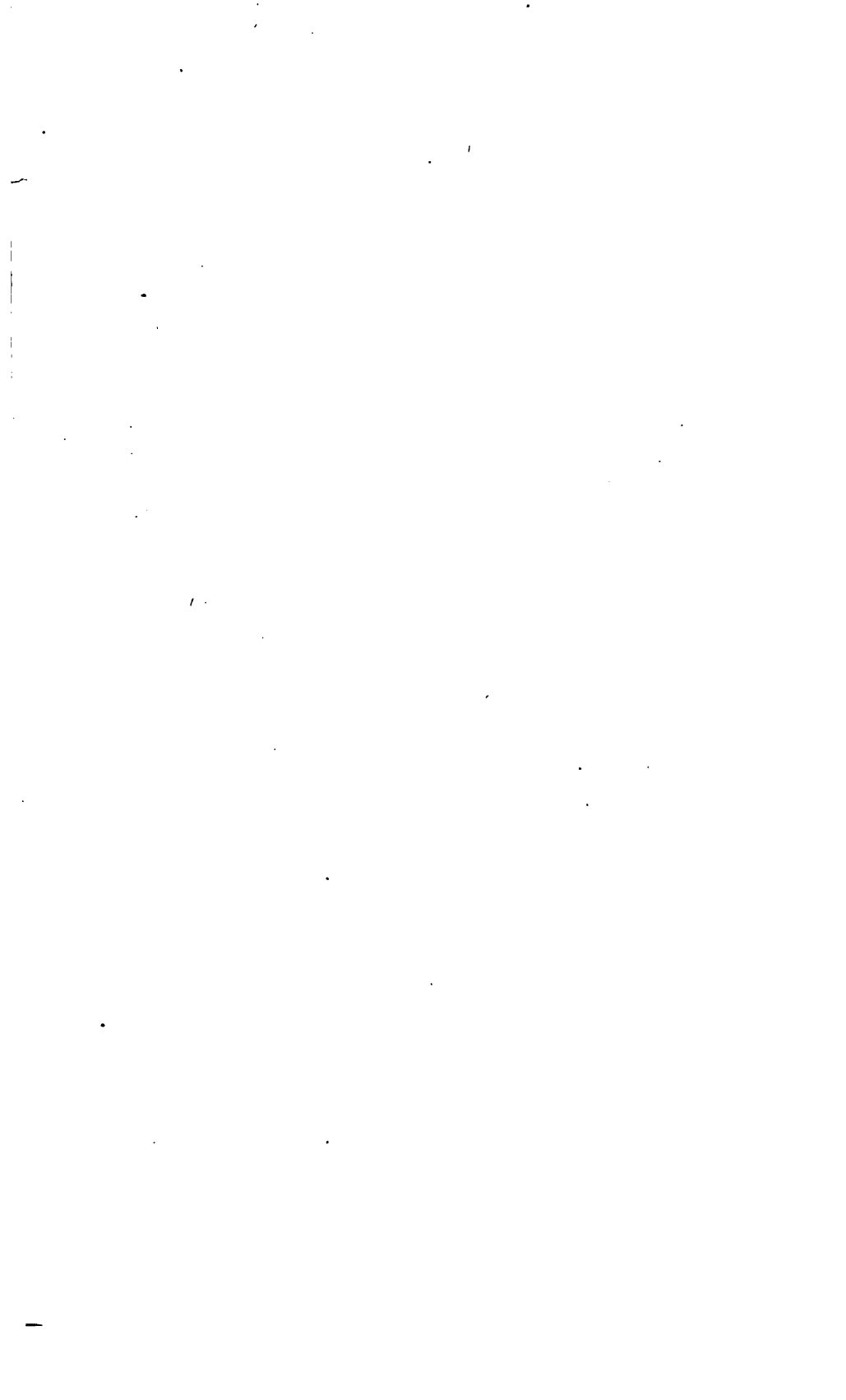


TABLE OF CASES

CITED IN THE OPINIONS REPORTED IN THIS VOLUME.

	A.	PAGE.
Adams v. Hastings & D. R. R. Co....	18 Minn. 260	114
Aiken v. West. R. R. Co.....	20 N. Y. 370	416
Alexander v. Hard.....	64 N. Y. 223	80
Alger v. Scott.....	54 N. Y. 14	563
Allen v. Williamsburgh Svgs. Bk....	69 N. Y. 321	63
Allis v. Read.....	45 N. Y. 142	519
Anderson v. Dickie.....	1 Robt. 238	149
Anderson, etc., R. R. Co. v. Kernodle.	54 Ind. 314.	113
Archer v. O'Brien.....	7 Hun, 146, 150	231
Arpin v. Chapin.....	Mass. Sup. Ct., Oct., 1885.	70
Astor v. Mayor, etc.....	62 N. Y. 580	288
Atty.-Gen'l v. Bk. of Niagara.....	Hopk. 354.....	493
Atty.-Gen'l v. Utica Ins. Co.....	2 Johns. Ch. 371.....	483
Auburn Exch. Bk. v. Fitch.....	48 Barb. 344.....	231
Austin v. Monroe.....	47 N. Y. 360, 366	558

	B.	
Bagley v. Smith.....	10 N. Y. 489	210
Baltimore & P. R. R. Co. v. Fifth } Baptist Church.....	108 U. S. 317.....	142
Bank of Br. N. Am. v. Merch'ts' } Nat. Bk.....	91 N. Y. 106, 111.....	572
Bank of Michigan v. Ely.....	17 Wend. 503	448
Banon v. Baltimore.....	2 Am. Jur. 103	146
Bare v. Hoffman.....	79 Penn. St. 71.....	112
Barney v. Worthington	37 N. Y. 112	448
Barry v. N. Y. C. & H. R. R. Co.	92 N. Y. 289	395
Bartlett v. Stinton.....	L. R., 1 C. P. 483.....	4
Bastable v. Syracuse.....	8 Hun, 587; 72 N. Y. 64.....	143
Beach v. City of Elmira.....	23 Hun, 158.	143
Beck v. Carter.....	63 N. Y. 283	395
Beckett v. Midland R. R. Co.....	L. R., 3 C. P. 82....	111
Bedell v. Chase.....	34 N. Y. 386	232
Bellinger v. N. Y. C. R. R. Co.....	23 N. Y. 42.....	107

	PAGE.
Benjamin v. Benjamin.....	5 N. Y. 383, 388..... 583
Bennett v. Leach.....	25 Hun, 178..... 161
Bergen v. Bennett.....	1 Caine's Cas. 1, 20..... 172
Bird v. Holbrook.....	4 Bing. 628..... 395
Blake v. Ferris.....	5 N. Y. 48, 58..... 385
Blennerhassett v. Sherman.....	105 U. S. 117..... 233
Blesch v. Chicago & N. W. R. R. Co.	43 Wis. 183..... 115
Blunt v. McCormick.....	3 Denio, 283..... 117
Bodine v. Killeen.....	53 N. Y. 93..... 80
Bonnell v. Griswold.....	68 N. Y. 294..... 337
Bonnell v. Griswold.....	89 N. Y. 122..... 74
Boone v. Citizens' Svgs. Bk.....	84 N. Y. 88..... 63
Borden v. Fitch.....	15 Johns. 121..... 38
Bordwell v. Collie.....	45 N. Y. 494..... 357
Boston v. Binney.....	11 Pick. 1..... 590
Bouton v. City of Brooklyn.....	15 Barb. 375, 395..... 299
Bowyer v. Cook.....	4 M. G. & S. 236..... 109
Boyer v. Schofield.....	2 Keyes, 628..... 160
Boyter v. Dodsworth.....	6 Term R. 681..... 534
Bradley v. Ragdale.....	64 Ala. 558, 559..... 233
Brewster v. Syracuse.....	19 N. Y. 116..... 13
Bridgeport v. N. Y. & N. H. R. R. Co.	36 Conn. 255..... 614
Brigg v. Hilton.....	99 N. Y. 517..... 616, 663
Bright v. Supv'rs Chenango Co.....	18 Johns. 243..... 96
Brill v. Tuttle.....	81 N. Y. 457..... 560, 563
Brinkerhoff v. Brown.....	6 Johns. Ch. 139..... 347
Brooklyn Pk. Com. v. Armstrong.....	45 N. Y. 234, 243..... 416
Brookman v. Kurzman.....	94 N. Y. 272..... 153
Brown v. Foster.....	113 Mass. 136..... 390
Brown v. Galley.....	Hill & Den. Supp. 380..... 123
Bruen v. Hone.....	2 Barb. 586..... 594
Buffalo Cath. Institute v. Bitter.....	87 N. Y. 250..... 337
Burke v. Witherbee.....	98 N. Y. 562..... 400, 522
Burrows v. Miller.....	5 How. Pr. 51..... 175
Byrnes v. City of Cohoes.....	67 N. Y. 204..... 143

C.

Caldwell v. Bruggerman.....	4 Minn. 270..... 354
Cameron v. Seaman.....	69 N. Y. 896..... 74
Campbell v. Hall.....	16 N. Y. 575..... 161
Campbell v. Walker.....	5 Ves. Jr. 678..... 172
C. & O. Canal Co. v. Hitchings.....	65 Me. 140..... 111
Canandaigua Academy v. McKeechie.....	19 Hun, 62, 68..... 470
Carl v. S. & F. du L. R. R. Co.....	46 Wis. 625..... 115
Carleton v. Carleton.....	85 N. Y. 813..... 488
Carleton v. Darcy.....	75 N. Y. 875, 877..... 309
Carter v. Warne.....	4 C. & P. 191..... 585

TABLE OF CASES CITED.

xvii

	PAGE.
Cary v. White.....	59 N. Y. 336..... 433
Cary v. White	52 N. Y. 138..... 438
Case v. Phelps	39 N. Y. 164..... 228
Chapin v. Dobson.....	78 N. Y. 74..... 462
Chapin v. Weed.....	1 Clarke's Ch. 464, 469..... 172
Chautauque Co. Bk. v. Risley	19 N. Y. 369..... 347
Chicago R. R. Co. v. People	73 Ill. 541..... 615
Childs v. Monins.....	6 Eng. C. L. 228..... 563
Chirac v. Reinecker.....	2 Pet. 613..... 161
City of Brooklyn v. B. C. R. R. Co.	47 N. Y. 475..... 390
City of North Vernon v. Voegler.....	2 N. East. Rep. 821..... 134
Clancy v. Byrne.....	56 N. Y. 129, 133..... 153
Clapp v. Graves.....	26 N. Y. 418..... 291
Clark v. Dillon	97 N. Y. 370..... 355
Clark v. Hume.....	1 Ryan & M. 207..... 585
Clarke v. Holmes.....	7 H. & N. 937..... 524
Clifford v. Dam.....	81 N. Y. 52..... 149, 151
Cobb v. Knapp.....	71 N. Y. 348..... 663
Colgate's Ex'r v. Colgate.....	23 N. J. Eq. 372..... 172
Com. Bk. of Lake Erie v. Norton.....	1 Hill, 501..... 71, 205
Comm. v. Passmore	1 Serg. & R. 219..... 257
Cone v. Niagara Ins. Co.....	60 N. Y. 619..... 504
Conger v. Ring.....	11 Barb. 356..... 172
Congreve v. Morgan	18 N. Y. 84..... 149
Conner v. Mayor, etc.....	1 Seld. 285..... 12, 533
Conner v. The City	2 Sandf. 370..... 533
Cook v. Allen.....	2 Mass. 462..... 157
Cook v. Litchfield.....	5 Sandf. 330..... 175
Copeland v. Stephens.....	1 B. & Ald. 594..... 585
Corby v. Hill.....	4 C. B. (N. S.) 556..... 395
Corcoran v. Holbrook.....	59 N. Y. 517..... 553
Corn Exch. Bk. v. Babcock.....	42 N. Y. 613..... 437
Cornthwaite v. First Nat. Bk.....	57 Ind. 268..... 559
Coughtry v. Globe W. Co.....	56 N. Y. 124..... 553
Crawford v. West Side Bk.....	100 N. Y. 51..... 60
Crispin v. Babbitt	81 N. Y. 516, 521..... 552, 607
Cromwell v. Kirk.....	1 Dem. 599..... 321
Cropsey v. Ogden.....	11 N. Y. 233..... 41, 42
Cross v. Beard.....	26 N. Y. 85..... 604, 605
Crotty v. Kimball	N. Y. Genl. Term, Oct., 1885..... 3
Culhane v. N. Y. C. & H. R. R. Co.	60 N. Y. 133..... 423

D.

Danolds v. State.....	89 N. Y. 36..... 215
Davenport v. Ruckman	37 N. Y. 568..... 149
Davis v. Mayor, etc.....	14 N. Y. 506..... 107
Davoue v. Fanning.....	2 Johns. Ch. 251..... 172

	PAGE.
DeCaters v. Chaumont	3 Paige, 178
DeForest v. Jewett	88 N. Y. 284
Dennis v. Maxfield	10 Allen, 138
Dewey v. Osborn	4 Cow. 329
Dickinson v. Poughkeepsie	75 N. Y. 65
Dimon v. Hazard	32 N. Y. 65
Doe v. Challis	17 Ad. & El. (N. S.) 166
Dolan v. Mayor, etc.	62 N. Y. 472
Dolan v. Mayor, etc.	68 N. Y. 274
Dorsey v. Smith	28 Cal. 21
Doughty v. Doughty	{ N. J. Eq.; 12 C. E. Gr. 315; 1 Stew. 581, 582
Douglass v. State	31 Ind. 429
Draper v. Stouvenel	35 N. Y. 507
Durant v. Durant	1 Hagg. Ecc. 748
Duryea v. Mayor, etc.	26 Hun, 120
Duval v. Covenhoven	4 Wend. 561
Dyger v. Schenck	23 Wend. 445, 446

E.

Eaton v. B. C. & M. R. R. Co.	51 N. H. 504
Edwards v. N. Y. & H. R. R. Co.	98 N. Y. 245, 248
Ehle v. Quackenboss	6 Hill, 537
Ehrichs v. DeMill	75 N. Y. 370
Eighmie v. Taylor	98 N. Y. 288
Ellis v. N. Y. C. R. R. Co.	95 N. Y. 546
Embury v. Conner	8 N. Y. 511
Erickson v. Quinn	47 N. Y. 410
Esty v. Baker	48 Me. 495
Etherington v. P. P. & C. I. R. R. Co.	88 N. Y. 641
Etz v. Daily	20 Barb. 32
Ex'rs Brasher v. Van Cortland	2 Johns. Ch. 244

F.

Farmer v. Dean	32 Beav. 327
Farmers & Mecha' Bk. v. Empire St. D. Co.	{ 5 Bosw. 290
Faucett v. Faucett	1 Bush, 511
Feltham v. England	L. R., 2 Q. B. 46
Ferguson v. Hubbell	97 N. Y. 507
Ferrin v. Myrick	41 N. Y. 315
Ferris v. People	35 N. Y. 125
Field v. West Orange	{ 86 N. J. Eq. 118, 120; 29 Alb. L. J. 397
First Nat. Bk. of Portland v. Schuyler.	7 J. & S. 440
Fleming v. People	27 N. Y. 329
Fletcher v. A. & S. R. R. Co.	25 Wend. 462

TABLE OF CASES CITED.

xix

	PAGE.
Fletcher v. Tayleur.....	17 C. B. 21..... 215
Flike v. B. & A. R. R. Co.....	53 N. Y. 549..... 552
Folliard v. Wallace.....	2 Johns. 895..... 380
Foot v. Stiles.....	57 N. Y. 899..... 95
Ford v. Chicago & N. W. R. R. Co..	14 Wis. 609..... 114
Forster v. Fuller.....	6 Mass. 58..... 559
Fowler v. N. Y. Gold Exch. Bk....	67 N. Y. 188..... 597
Franklin Wharf Co. v. Portland...	67 Me. 46..... 146
Friery v. People.....	35 N. Y. 125..... 240
Froneberger v. Lewis.....	79 N. C. 426..... 172
Fuller v. Jewett.....	80 N. Y. 46..... 394
Fulton v. Blake.....	5 Biss. 371..... 604
Fulton v. Whitney.....	66 N. Y. 548..... 172

G.

Gallatan v. Cunningham.....	8 Cow. 361..... 172
Garland v. Rives.....	4 Rand. 282..... 233
Garsted v. Turner.....	71 Penn. St. 56..... 215
Geer's Case.....	82 N. Y. 575..... 12
Gibbs v. Queen Ins. Co.....	63 N. Y. 114, 127..... 34
Gibson v. Cranage.....	39 Mich. 40..... 390
Gibson v. Erie R. Co.....	63 N. Y. 440..... 524
Gillet v. Hutchinson's Adm.....	24 Wend. 184..... 558
Glascock v. Lyons.....	20 Ind. 1..... 538
Godfrey v. Moser.....	66 N. Y. 250..... 609
Goodtitle v. Tombs.....	3 Wils. 118..... 14
Gordon v. Cornes.....	47 N. Y. 608..... 12
Gould v. Ray.....	13 Wend. 633..... 558
Gragg v. Martin.....	12 Allen, 498..... 233
Greene v. Burke.....	23 Wend. 490..... 538
Greene v. Hewitt.....	Peake's N. P. 243..... 534
Greene v. N. Y. C. & H. R. R. Co.	65 How. Pr. 154..... 116
Greenup v. Vernon.....	16 Ill. 26..... 590
Grocers' Bk. v. Penfield.....	79 N. Y. 502..... 438

H.

Hall v. Southmayd.....	15 Barb. 32, 36..... 588
Hambleton v. Veere.....	2 Saund. 169..... 109
Harding v. Hale.....	2 Gray, 399..... 407
Harger v. Worrall.....	69 N. Y. 371..... 71
Harrington v. St. P. & S. C. R. R. Co.	17 Minn. 215..... 114
Harwood v. Wood.....	2 Lev. 245..... 534
Haskell v. New Bedford.....	108 Mass. 208..... 146
Hawkins v. Pemberton.....	51 N. Y. 198..... 514
Hawley v. No. C. R. W. Co.....	82 N. Y. 370..... 525
Hayden v. Smithville M. Co.....	29 Conn. 548..... 524

	PAGE.
Heinemann v. Heard.....	62 N. Y. 448 299
Hemmingway v. Eaton.....	13 Mass. 108 467
Henderson v. N. Y. C. R. R. Co.....	78 N. Y. 423 107, 121
Henley v. Brooklyn Ice Co.....	14 Blatchf. 522..... 604
Hibbard v. N. Y. & E. R. R. Co.....	15 N. Y. 455, 460 370, 372
Hills v. Banister.....	8 Cow. 81..... 559
Hines v. City of Lockport.....	50 N. Y. 236 142
Hoffman v. Bk. of Milwaukee.....	12 Wall. 181 71
Hoffman v. Gallaher.....	6 Daly, 42 390
Hollenbeck v. Donnell.....	94 N. Y. 343 483
Hollister v. Hopkins.....	13 Hun. 210..... 503
Holmes v. N. E. Ry. Co.....	L. R., 6 Exch. 123..... 395
Holmes v. Wilson.....	10 A. & E. 503..... 110
Horn v. New Lots.....	83 N. Y. 100 244
Houghkirk v. D. & H. C. Co.....	92 N. Y. 219 215
Hounsell v. Smyth.....	7 C. B. (N. S.) 731 393
Howard v. McDonough.....	77 N. Y. 592 637
Howe Machine Co. v. Bryson.....	44 Iowa, 159 215
Hoy v. Grenoble.....	84 Penn. 9 215
Hunt v. Hunt.....	72 N. Y. 217..... 84, 87, 88, 89
Hunter v. Wetsell.....	57 N. Y. 375; 84 id. 549 519

I.

Ingersoll v. Mangam.....	84 N. Y. 622 321
In re Anthony St.....	20 Wend. 618 309
In re Arnold.....	60 N. Y. 26 288
In re Dep't Public Parks.....	86 N. Y. 437..... 194
In re Heller.....	3 Paige, 199, 200..... 583, 585
In re Ingraham.....	64 N. Y. 810 299
In re Mayer.....	50 N. Y. 504..... 194
In re Upson.....	89 N. Y. 67 194
In re Waite.....	99 N. Y. 433 34
In re Watson.....	3 Lans. 408..... 247

J.

Jackson v. Gumaer.....	3 Cow. 553..... 477
Jackson v. Hathaway.....	15 Johns. 447..... 417
Jackson v. Loomis.....	4 Cow. 168..... 15
James v. Patten.....	6 N. Y. 9 645
Jaques v. Millar.....	L. R., 6 Ch. Div. 153..... 214
Jewett v. Noteware.....	30 Hun. 192..... 232
Johnson v. Lawrence.....	95 N. Y. 154 454
Jones v. Rahilly.....	16 Minn. 320..... 354
Jordan v. Van Epps.....	85 N. Y. 427..... 137
Journey v. Brackley.....	1 Hilt. 447..... 585

TABLE OF CASES CITED.

xxi

K.

PAGE.

Kain v. Smith.....	89 N. Y. 375.....	524, 525
Keeney v. Home Ins. Co.....	71 N. Y. 896.....	438
Kellett v. Rathbun.....	4 Paige, 102.....	321
Kellinger v. Forty-second St., etc., } R. R. Co.....	50 N. Y. 206.....	107
Kellogg v. N. Y. C. & H. R. R. Co.	79 N. Y. 73.....	423
Kelly v. Brooklyn.....	4 Hill, 263.....	562
Kelly v. Sheehan.....	76 N. Y. 325.....	291
Kennedy v. Shaw.....	38 Ind. 474.....	354
Kilmer v. Hathorn.....	78 N. Y. 228, 230.....	292
Kimball v. Thompson.....	4 Cush. 441.....	233
King v. N. Y. C. & H. R. R. Co.	66 N. Y. 181, 184.....	388
Kinnier v. Kinnier.....	45 N. Y. 535.....	80, 81
Kissam v. Edmonston.....	1 Ired. Eq. 180.....	233
Knapp v. Smith.....	27 N. Y. 277.....	80
Koon v. Mazuzan.....	6 Hill, 44.....	160

L.

Lamb v. Walker.....	L. R., 8 Q. B. D. 389.....	111
Lane v. Salter.....	51 N. Y. 1.....	175
Lane v. Schermerhorn.....	1 Hill, 97.....	535
Langdon v. Mayor, etc.....	93 N. Y. 129.....	56
Laning v. N. Y. C. R. R. Co.....	49 N. Y. 521.....	399, 552
Lawlor v. Alton.....	L. R., 8 Ir. 160.....	538
Laytin v. Davidson.....	95 N. Y. 263.....	454
Ledyard v. Ten Eyck.....	36 Barb. 102, 125.....	56
Lewis v. Burr.....	8 Bosw. 140.....	535
Loomis v. Ruck.....	56 N. Y. 462.....	437
Lovenden v. Lovenden.....	1 Hagg. Const. 1.....	659
Lowry v. Pinson.....	2 Bailey Law, 324.....	233
Luff v. Pope.....	5 Hill, 413.....	562
Lynch v. Mayor, etc.....	76 N. Y. 60.....	142

M.

McCall v. Sun Mut. Ins. Co.....	66 N. Y. 505, 515.....	468
McCarthy v. Syracuse.....	46 N. Y. 194.....	141
McDonald v. Mayor, etc.....	68 N. Y. 23.....	135
McGiffin v. Baird.....	62 N. Y. 329.....	357
McKeon v. See.....	4 Robt. 449.....	116
McKnight v. Dunlop.....	5 N. Y. 537.....	519
McKyring v. Bull.....	16 N. Y. 297.....	354
McNeil v. Reid.....	9 Bing. 68.....	215
McVeany v. Mayor, etc.....	80 N. Y. 185.....	533, 535, 537, 546
McWhorter v. Benson.....	Hopk. 28, 42.....	457
Mahady v. B. R. R. Co.....	91 N. Y. 148.....	107, 108

	PAGE.
Mahon v. N. Y. C. R. R. Co.....	24 N. Y. 658 107, 118, 121, 124
Manning v. Hagan	78 N. Y. 615 553
Marie v. Garrison.....	83 N. Y. 14 376
Martin v. Black	9 Paige, 641..... 585
Martine v. Lowenstein	68 N. Y. 456 293
Mason v. Hunt	1 Doug. 297... 449
Mason v. Roosevelt.....	5 Johns. Ch. 534..... 321
Massoth v. D. & H. C. Co.....	64 N. Y. 524, 529..... 423
Masterton v. Mayor, etc	7 Hill, 61 210
Matter of Bradner	87 N. Y. 171 3
Matter of Deering	82 N. Y. 1, 11..... 193
Matter of DePeyster	4 Sandf. Ch. 511, 512..... 457
Matter of Harlem R. R.....	98 N. Y. 12 325
Matter of Moore.....	67 N. Y. 555 325
Matter of Ryers	72 N. Y. 15 95
Matter of Walter	75 N. Y. 354 191
Matter of Woolsey	95 N. Y. 135 679
Mayor, etc. v. Lord	17 Wend. 285 144
Menagh v. Whitwell.....	52 N. Y. 146 268
Merchts, Bk. v. Griswold.....	72 N. Y. 472, 479 448, 449, 450
Meriam v. Harsen	4 Edw. 70... 477
Merritt v. Village of Port Chester..	71 N. Y. 309 243, 244, 298, 546
Metcalf v. Williams	104 U. S. 93 663
Metzger v. Attica & A. R. R. Co....	79 N. Y. 171 494
Michoud v. Girod.....	4 How. (U. S.) 503..... 172
Miesell v. Globe Mut. L. Ins. Co....	76 N. Y. 115 .. 390
Miller v. L. I. R. R. Co.	71 N. Y. 380..... 672
Mills v. Brooklyn.....	32 N. Y. 489, 495..... 141
Mitchell v. Bunch	2 Paige, 606, 620..... 175
Mitchell v. Darley M. C. Co	L. R., 14 Q. B. D. 125..... 111
Mitchell v. Read	84 N. Y. 556..... 215, 218
Moore v. Hegeman	92 N. Y. 521 43
Moore v. Noble.....	53 Barb. 425 343
Morey v. Tracey....	92 N. Y. 581 175
Morgan v. Louisiana.....	3 Otto, 223 615
Muller v. Eno.....	14 N. Y. 597 515
Mulry v. Norton.....	100 N. Y. 424 57
Munger v. Shannon.....	61 N. Y. 251, 255 560, 563
Murray v. Berdell.....	98 N. Y. 480 14
Murray v. Gouverneur.....	2 Johns. Cas. 441 15
Myer v. Heneke	55 N. Y. 412 508

N.

Nelson v. Mayor, etc.....	63 N. Y. 544 135
Newman v. Supv'rs Liv. Co	45 N. Y. 676 244
N. Y. L. Ins. Co. v. Universal L. Ins. Co.	88 N. Y. 424 440
N. Y. & N. H. R. R. Co. v. Schuyler.	34 N. Y. 30 449

TABLE OF CASES CITED.

xxiii

	PAGE.
Nichols v. Johnson	10 Conn. 192..... 508
Nichols v. MacLean.....	101 N. Y. 526..... 546
Noe v. Gibson.....	7 Paige, 518..... 585
Noonan v. City of Albany ..	79 N. Y. 470, 475..... 148
Norton v. Huxley	18 Gray, 285..... 408

O.

O'Brien v. N. Y. C. & H. R. R. Co.	80 N. Y. 236..... 370
Osterhoudt v. Rigney ..	98 N. Y. 222..... 94
Osterhoudt v. Supervisors, etc.	98 N. Y. 239..... 348

P.

Pantzar v. Tilly Foster M. Co.....	99 N. Y. 368..... 553
Parker v. Syracuse	81 N. Y. 376..... 563
Parr v. Greenbush.....	72 N. Y. 463..... 135
Parsons v. Johnson	68 N. Y. 62, 66..... 629
Pennoyer v. Neff	95 U. S. 714..... 39
People v. Albany & V. R. R. Co....	77 N. Y. 232..... 348
People v. Baker.....	{ 76 N. Y. 78, 82..... 29 30, 81 82, 33, 35, 36, 39, 40, 42, 43
People v. Bd. Comm'rs, etc	82 N. Y. 506..... 92
People v. Briggs.....	50 N. Y. 553..... 194
People v. Caryl.....	3 Park. Cr. 326..... 372
People v. City of Albany.....	4 Hun, 675, 679..... 416
People v. Co. Bedford.....	7 S. & R. 392..... 584
People v. Cunningham.....	1 Denio, 524, 530..... 257
People v. Empire Mut. L. Ins. Co....	92 N. Y. 105, 109..... 386
People v. Faber	92 N. Y. 146..... 41
People v. Ferris.....	76 N. Y. 326..... 536
People v. Hackley	24 N. Y. 74, 78..... 252
People v. Hill	53 N. Y. 547..... 92
People v. Hills	35 N. Y. 449..... 303
People v. Hopson.....	1 Denio, 579..... 534, 538
People v. Horton.....	64 N. Y. 610..... 257
People v. Hovey	5 Barb. 117..... 41
People v. Jillson	3 Park. Cr. 234..... 372
People v. Lane	55 N. Y. 217..... 536
People v. Lawrence	41 N. Y. 137..... 12
People v. McClave	99 N. Y. 83..... 486
People v. Miller.....	24 Mich. 458..... 538
People v. Nat. Trust Co	82 N. Y. 283..... 533
People v. Nostrand	46 N. Y. 375..... 538
People v. Ransom	7 Wend. 417..... 240
People v. Restell	3 Hill, 289, 295..... 252
People v. Smith	69 N. Y. 175..... 21
People v. Stevens	5 Hill, 616..... 536

	PAGE
People v. Stilwell	19 N. Y. 531 93
People v. Stout	8 Park. Cr. 670 129
People v. Supv'rs Albany Co	12 Wend. 257 96
People v. Supv'rs Delaware Co	45 N. Y. 196 96
People v. Tieman	30 Barb. 193 533
People v. Vail	20 Wend. 12 536
People v. Wheeler	31 N. Y. 83 95
People v. White	24 Wend. 518, 539 538
People, ex rel. El. R. R. Co., v. } Com'rs of Taxes }	82 N. Y. 459 325, 327
People, ex rel. Green, v. Smith	55 N. Y. 135 498
People, ex rel. Hawver, v. Com'rs, etc.	13 Wend. 310 222
People, ex rel. Mayor, v. Nichols	79 N. Y. 582 534
People, ex rel. Rochester, v. Briggs	50 N. Y. 553 303
People, ex rel. Thomas, v. Com'rs, etc.	37 N. Y. 360 222
People, ex rel. Williamson, v. Mc- } Kenney }	53 N. Y. 374 546
Petrie v. Shoemaker	24 Wend. 84, 85 535
Pettit v. Shepherd	5 Paige, 498, 501 231
Peyser v. Mayor, etc.	70 N. Y. 497 244
Philbrick v. Dallett	2 J. & S. 370 70
Phinizy v. City of Augusta	47 Ga. 260, 263 143
Pier v. Hanmore	86 N. Y. 95 74
Pierson v. People	79 N. Y. 424 129
Pinney v. Adm'rs of Johnson	8 Wend. 500 558
Plate v. N. Y. C. & H. R. Co	37 N. Y. 472 107, 117, 121
Pollock v. Pollock	71 N. Y. 187 658
Pope v. T. H. C., etc., Co	87 N. Y. 187, 140 34
Powers v. N. Y., L. E. & W. R. R. Co.	98 N. Y. 274, 280 399
Pumpelly v. Green Bay Co.	13 Wall. 166, 168 145
Pumpelly v. Phelps	40 N. Y. 59 558

Q.

Queen v. Blizzard	L. R., 2 Q. B. 55 537
-----------------------------	---------------------------------

R.

Radcliff's Ex'rs v. Mayor, etc.	4 N. Y. 195 107, 144, 145
Rae v. Beach	76 N. Y. 164 292, 293
Redfield v. Utica, etc., R. R. Co.	25 Barb. 54 123
Redmond v. Adams	51 Me. 429 562
Rex v. Grimes	5 Burr. 2598 535
Rex v. Hibden	And. 388 535
Rex v. Mayor of York	5 Term R. 66 535
Rex v. Whitwell	5 Term R. 85 537
Robinson v. Bk. of Newberne	81 N. Y. 385 305
Robinson v. Frost	14 Barb. 536 354
Robinson v. Reynolds	2 Q. B. 196, 211 71
Rosenblatt v. Johnston	104 U. S. 462 305

TABLE OF CASES CITED.

XXV

	PAGE.
Rosewell v. Prior.....	2 Salk. 459..... 109
Ross v. Mather.....	51 N. Y. 108, 110..... 343
Rowe v. Smith.....	45 N. Y. 230..... 80
Russell v. Brown.....	63 Me. 203..... 111

S.

St. Peter v. Denison.....	58 N. Y. 416..... 145
S. & O. Canal Co. v. Bourquim.....	51 Ga. 279..... 116
Schell v. Plumb.....	55 N. Y. 592, 598..... 121, 212
Schmidt v. Opie.....	38 N. J. Eq. 141..... 233
Schoenwald v. Metr. Bk.....	57 N. Y. 418..... 62
Scriver v. Smith.....	100 N. Y. 471..... 145
Segan v. Crenshaw.....	10 La. Ann. 239..... 538
Segelken v. Meyer.....	94 N. Y. 473..... 8
Severy v. Nickerson.....	120 Mass. 306..... 395
Sharp v. Johnson.....	4 Hill, 92..... 299
Sharp v. Speir.....	4 Hill, 76..... 299
Shaw v. Jewett.....	86 N. Y. 616..... 425
Shaw v. Republic L. Ins. Co.....	69 N. Y. 286, 293..... 836
Shelley v. Boothe.....	73 Mo. 74..... 233
Sheridan v. Andrews.....	49 N. Y. 478..... 161
Simpson v. Lond. & N. W. R. Co.....	L. R., 1 Q. B. D. 274..... 214
Slater v. Jewett.....	85 N. Y. 61..... 552, 553
Smith v. London Docks Co.....	L. R., 3 C. P. 326..... 395
Smith v. Mayor, etc.....	66 N. Y. 295..... 141
Smith v. Mayor, etc.....	68 N. Y. 552..... 326
Smith v. People.....	47 N. Y. 380..... 486
Southwell v. Bowditch.....	L. R., 1 C. P. Div. 100, 374..... 663
Sparks v. Heritage.....	45 Ind. 66..... 354
Starin v. Kelly.....	88 N. Y. 421..... 233
Stevenson v. Lesley.....	70 N. Y. 512..... 457
Story v. Elevated R. R. Co.....	90 N. Y. 122..... 107, 108, 118, 417
Stowell v. Chamberlain.....	60 N. Y. 272..... 408
Stowell v. Otis.....	71 N. Y. 36..... 354
Stringham v. Stewart.....	100 N. Y. 516..... 552
Strusburgh v. Mayor, etc.....	87 N. Y. 453..... 244
Swett v. Colgate.....	20 Johns. 196..... 343
Swords v. Edgar.....	59 N. Y. 28, 34..... 151
Sylvester v. Ralston.....	31 Barb. 286..... 588
Syracuse Ch. P. Co. v. Wing.....	85 N. Y. 421, 426..... 233

T.

Taft v. Brewster.....	9 Johns. 834..... 559
Tassey v. Church.....	4 Watts & S. 346..... 561
Taylor v. Bradley.....	39 N. Y. 129..... 211, 218
Taylor v. Met. El. R. Co.....	50 N. Y. Super. 311..... 116
Terhune v. Mayor, etc.....	88 N. Y. 247..... 546

	PAGE.
Tew v. Jones	13 M. & W. 13..... 590
Thatcher v. Dismore.....	5 Mass. 299..... 559
Thayer v. Brooks	17 Ohio, 489 .. 118
Thomas v. Pemberton	7 Taunt. 206... 585
Thompson v. Bower.....	60 Barb. 463, 476..... 588
Thompson v. Gibson	8 M. & W. 281..... 111
Thompson v. Morris Canal, etc., Co. 17 N. J. L. 480.....	118
Thorne v. Turck.....	94 N. Y. 90..... 281
Tooker v. Arnoux	76 N. Y. 397..... 562
Torrey v. Bk. of Orleans.....	9 Paige, 649..... 172
Troup v. Haight.....	Hopk. 239..... 477
Tyler v. Ames.....	6 Lans. 280..... 390

U.

Ulster Co. Bk. v. McFarlan	5 Hill, 433..... 448
U. S. v. Addison.....	6 Wall. 291..... 588
U. S. for, etc., Crawford v. Addison. 6 Wall. 271.....	546
Urquhart v. Ogdensburgh.....	91 N. Y. 67, 71..... 142

V.

Van Alen v. Am. Nat. Bk.....	52 N. Y. 1..... 568, 573
Van Brunt v. Eoff	35 Barb. 501..... 508
Van Epps v. Van Deusen	4 Paige, 84..... 321

W.

Wagstaff v. Lowerre	23 Barb. 209..... 456, 457
Wakeman v. W. & W. Manuf. Co.. 101 N. Y. 205.....	276
Walsh & Gallagher v. Durkin.....	12 Johns. 99..... 175
Waterbury v. Sturtevant.....	18 Wend. 354..... 232
Water Com'rs of Clinton v. Dwight. 101 N. Y. 9.....	194
Weaver v. Barden	49 N. Y. 286..... 354
Wendell v. People	8 Wend. 183, 190..... 158
West Point Iron Co. v. Reymert	45 N. Y. 703..... 477
Wheeler v. Billings.....	38 N. Y. 263..... 354
Wheeler v. Clark.....	58 N. Y. 267..... 416, 417
White v. Miller.....	71 N. Y. 118..... 215
Whitehouse v. Fellowes.....	10 C. B. (N. S.) 765..... 111
Whitmore v. Bischoff.. ..	5 Hun, 176..... 117
Williams v. N. Y. C. R. R. Co	16 N. Y. 97..... 107, 117
Williams v. Williams.....	1 Hagg. Cons. 299..... 660
Wilson v. Mayor, etc.. ..	1 Denio, 595, 598..... 141, 144
Wood v. Wood.....	83 N. Y. 575..... 80
Woodhull v. Rosenthal	61 N. Y. 394..... 15

Y.

Yale v. Dederer... ..	18 N. Y. 285 ; 22 id. 450..... 437
-----------------------	------------------------------------

Z.

Zaleski v. Clark.....	44 Conn. 218... .. 390
-----------------------	------------------------

CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

COMMENCING DECEMBER 8, 1885.

EDWARD J. CHAPIN, Respondent, *v.* WALTER J. FOSTER,
Appellant.

The court has no authority to impose as a condition of granting an order to set aside an execution against the person, unlawfully issued, that defendant shall stipulate not to sue for damages for an arrest under the unlawful process; nor does the fact that the order awards costs, authorize the condition.

It seems that if the condition be attached to the award of costs only, it would be proper.

Where the order imposes such a condition, defendant has the right to appeal from that portion thereof, so long as he has not availed himself of the portion awarding costs; it is not necessary to appeal from the whole order.

The complaint in this action alleged in substance that plaintiff, having in his possession certain property pledged to him as security for a debt, delivered the same to the defendant under an agreement between the parties and the pledgor, that defendant should receive the property, sell the same, and out of the proceeds pay plaintiff's claim; that defendant sold the property and has in his possession sufficient of the avails to pay plaintiff's debt, but refuses so to do. *Held*, that the action was *ex contractu* and no order of arrest having been issued therein a judgment in plaintiff's favor did not authorize an execution against the person. (Code of Civ. Pro., § 549.)

Bartlett v. Stinton (L. R., 1 C. P. 488), distinguished.

(Argued November 24, 1885; decided December 8, 1885.)

SICKELS — VOL. LVI. 1

Statement of case.

APPEAL from a portion of an order of the General Term of the Supreme Court in the third judicial department made November 20, 1883, which reversed with costs an order of the Special Term denying a motion to vacate or set aside an execution against the person of defendant, and granted the motion with costs of motion "upon the defendant stipulating not to sue for false imprisonment on account of his arrest or imprisonment under said execution." The appeal was from that portion of the order imposing the condition.

The complaint alleged in substance that plaintiff in October, 1875, had in his possession certain property pledged to him as security for a debt. That the pledgors and defendant being desirous of obtaining possession of said property, entered into an agreement with plaintiff, by which defendant agreed to receive said property, sell the same, and out of the proceeds, to pay among other debts, plaintiff's claim. That in pursuance of said agreement, plaintiff delivered the property to defendant, who sold and converted the same into money; realizing more than sufficient to pay for all the indebtedness specified in the contract including plaintiff's claim; but that although he has the money in his possession he refuses to pay said claim. No order of arrest was obtained. Plaintiff obtained judgment, and upon return of execution against property unsatisfied the execution in question was issued, and defendant was arrested by virtue thereof.

Geo. W. Stephens for appellant. Whenever a party is entitled to a vacation of an order as a matter of right, the court cannot abridge that right by compelling him in order to obtain it to surrender another. (*Matter of Bradner*, 87 N. Y. 171; *Tompkins v. Smith*, 62 How. 449; *Wilder v. Guernsey*, 19 Alb. L. J. 401; *Mayer v. Rothschild*, 59 How. 510; *Faulkner v. Morey*, 22 Hun, 379; *Crotty v. Kimball* [MSS.] Gen. Term, Sup. Ct., Oct. 1885.)

John W. Stone for respondent. The action being for conversion and misappropriation, a body execution was prop-

Opinion of the Court, per RAPALLO, J.

erly issued. (*Roberts v. Prosser*, 53 N. Y. 260; *Wood v. Henry*, 40 id. 124; *Segelken v. Meyer*, 94 id. 473.) The court had power to impose the condition not to sue for false imprisonment. (*In re Bradner*, 87 N. Y. 176; *Morangué v. Walden*, 6 Hun, 529; *Mobnow v. Kenan*, 22 How. 190; *Parcher v. Billows*, 23 id. 421; *Brown v. Teat*, 1 Hill, 221; *Chandler v. Bricknell*, 4 Cow. 49; *Robb v. Moffat*, 3 Johns. 397.) The appellant should have appealed from the entire order. (*Wallace v. Castel*, 68 N. Y. 370; *Bartlett v. Stinton*, L. R., 1 C. P. 483.) The defendant cannot enforce that portion of the direction that was favorable to him and appeal from the portion that was unfavorable. (*Bennett v. Vansyckler*, 18 N. Y. 481; *Greenberg v. Blumendahl*, 66 How. 62; *Wheeler v. Tracy*, 47 N. Y. 363; *Tribune v. Smith*, 40 id. 81; *Matter of Water-Works*, 85 id. 478, 648.)

RAPALLO, J. This case comes within the decision in *Segelken v. Meyer* (94 N. Y. 473). The action was not one of those specified in section 549 of the Code of Civil Procedure, but was *ex contractu* for neglecting and refusing to pay a debt due to the plaintiff out of the proceeds of property which had been placed in the hands of the defendant to be by him paid for the purpose of paying certain debts, among which was that due the plaintiff. No order of arrest having been issued in the action, the judgment therein did not authorize an execution against the person. The execution against the person of the defendant was, therefore, unlawfully issued, and the defendant had a legal right to a reversal of the order of the Special Term, which denied his motion that it be set aside and he be released from the custody of the sheriff.

The General Term consequently erred in attaching to its order of reversal the condition that the defendant should stipulate not to sue, etc. (*Matter of Bradner*, 87 N. Y. 171; *Crotty v. Kimball*, N. Y. Gen. Term, Oct. 1885.)

It is claimed that, as the order of reversal awards costs to the defendant, and such award of costs was in the discretion of the court, it had the right to attach the condition in question to

Opinion of the Court, per RAPALLO, J.

its order. If the condition had been attached to the award of costs simply, it could stand, but it is not so limited. It is attached to the whole order, and the consequence is, that if the defendant declined to give the stipulation, the erroneous order of the Special Term and the execution against his person would remain in force. The plaintiff claims that the defendant should have appealed from the whole order. This, it is obvious, he could not be required to do, for a reversal of the whole order would have left the order of the Special Term, and the execution, in full force.

It does not appear that the defendant has collected or demanded the costs awarded to him by the order of reversal, and the case, therefore, does not come within that class of cases which hold that a party who has availed himself of provisions in his favor, contained in an order, has thereby waived the right to appeal from other provisions therein which are adverse to him.

The case is distinguishable from that of *Bartlett v. Stinton* (L. R., 1 C. P. 483). In that case the moving party, by his notice of motion, asked the court for the exercise of its discretionary power in his favor, and his motion was granted on terms. In the present case the decision of the Special Term was against him. He did not, by his appeal to the General Term, ask for the exercise of any discretion, nor submit himself to its discretion to impose terms upon him. His appeal was based upon a purely legal point, and the effect of the appeal was to demand, as matter of right, that the erroneous order appealed from be reversed. Whatever the General Term added to that reversal was of its own volition, and the defendant had the right to appeal from that part of the order which prejudiced him, so long, at all events, as he had not undertaken to enforce any other part of the order which rested in the discretion of the General Term.

The order of the General Term should be modified by striking out the condition specified in the notice of appeal, with costs.

All concur.

Ordered accordingly.

Statement of case.

SALLIE G. THORINGTON et al., Appellants, v. J. VAUGHN MERRICK et al., Respondents.

101

5

147

160

In an action to compel a trustee to account and pay over the sum found due, and to convey to plaintiffs the trust estate, an attachment will not lie. (Code of Civ. Pro., § 635.)

The affidavit upon which an attachment was issued in such an action stated that "the amount of plaintiffs claim in said action is, to-wit: \$10,000, or other larger sum with interest * * * over and above all discounts and set-offs," and as grounds of the claim, alleged in substance that a claim for \$9,000, secured by mortgage, was put into defendants' hands for collection, they agreeing to account for and turn over the proceeds; that they collected and discharged the claim, receiving on such settlement certain real estate "of great value," the title to which they took in their own names, a portion of which they collusively and without the knowledge of the owners of the claim disposed of, and the balance they hold; but refuse to convey or to account for moneys received. *Held*, that the affidavit was insufficient, under the Code of Civil Procedure (§ 636), to warrant the attachment, as it did not state that a specific sum was due over and above all counter-claims, or that plaintiffs were entitled to recover any sum; and that the facts stated fail to show that plaintiffs are entitled to recover the sum named.

The order appealed from affirmed a Special Term order vacating the attachment. Neither order stated the ground for the decision. *Held*, that it was discretionary with the court below to determine, from the facts stated whether a case for an attachment was made, and its decision was not reviewable here.

(Submitted November 24, 1885; decided December 8, 1885.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made February 15, 1885, which affirmed an order of Special Term vacating and setting aside a warrant of attachment issued herein.

The affidavit upon which the attachment was issued alleged "that a cause of action exists in favor of said plaintiffs against said defendants, for which said action is commenced, or is about to be, and the amount of plaintiffs' claim in said action is, to-wit: \$10,000 with interest from the 1st day of January, 1883, over and above all discounts and set-offs, and that the ground of said claim and cause of action is as follows:" The grounds

Statement of case

stated were, in substance, that deponent, as trustee for the plaintiffs, held a certain mortgage claim which he placed in the hands of defendants for collection, in pursuance of an agreement, in writing, by which defendants agreed to collect the same, and to duly account and turn over the proceeds to the deponent as trustee, or to the *cestui que trusts*; that defendants collected and discharged the claim, but have not accounted as agreed; that, in the settlement of said claim, defendants took certain real estate of great value, which they caused to be conveyed to themselves; that a portion of said real estate they collusively resold and reconveyed to the mortgagor without the authority or consent of deponent or the *cestui que trusts*; that the balance of the real estate they still hold and refuse to convey to those entitled thereto, and that defendants are non-residents but have property in this State.

J. S. Winter for appellants. Where the affidavit for an attachment sets forth enough to call on the officer for the exercise of his judgment, it gives jurisdiction. (*Conklin v. Dutcher*, 5 How. 386; 1 Code R. [N. S.] 49; *Skinner v. Kelly*, 18 N. Y. 355.) On motion to set aside the attachment for irregularity, it will be held sufficient. (*Talcot v. Rosenburg*, 3 Daly, 203; *Niles v. Vanderges*, 14 How. 547; *Van Loon v. Lyons*, 61 N. Y. 24; *Schoonmaker v. Spencer*, 54 id. 366; *Furman v. Walter*, 13 How. 348.) It seems sufficient to confer jurisdiction when the affidavit makes out a clear *prima facie* case. (*Mott v. Lawrence*, 17 How. 559; 1 Code R. [N. S.] 104; 3 Sandf. 703; *Woodhouse v. Todd*, 10 Weekly Dig. 59; 9 Rep. 621.) The affidavit should contain a statement of the facts out of which the claim arose, and they should appear to warrant the claim or conclusion deduced from them. (*Manton v. Poole*, 67 Barb. 330; *S. C.*, 4 Hun, 638; *Easton v. Molavasa*, 7 Daly, 147; *Allen v. Meyer*, id. 229.) An averment that the amount of plaintiffs claim in the action is a sum stated over and above all discounts and set-offs, is the equivalent of the statement that said claim is the sum stated "over and above all counter-claims known to plaintiffs." (*Lamkin v. Douglass*, 27 Hun, 517; *Alford v.*

Statement of case.

Cobb, 28 id. 22; *Trow P. Co. v. Hart*, 60 How. 190; *Rupert v. Haug*, 1 Civ. Pro. 417; 87 N. Y. 141.) In order to justify the issuing of an attachment under the Code, it is not necessary that the plaintiff should have a cause of action for the payment of the money merely. It is enough that a cause of action exists against the defendant, and that the amount of the claim, and the grounds thereof are stated. (*Ward v. Bagg*, 18 Barb. 139; *Eaton v. Molavasa*, 7 Daly, 147; *Allen v. Meyer*, id. 229.) It is no objection that the action is *ex contractu* even though it is in whole or in part for unliquidated damages, if the claim is for money, and the debt of an actual character, actually due and not dependent on any contingency. (Drake on Attach. [5th ed.] 13-25, §§ 13-23; *Lennox v. Howland*, 3 Cai. 323; *In re Francisco Marty*, 3 Barb. 229; *Lawton v. Riel*, 51 id. 30; *Ward v. Bogg*, 18 id. 139; *Hagood v. Jordans*, 12 Ala. 180.) Where the defendant's non-feasance or default is of a duty created by contract, the action should be in *assumpsit*. (1 Chitty's Pl. 153.) The affidavit is unquestionably sufficient, if, after setting forth the dealings between the parties and the nature of the indebtedness, it alleges that the defendant by means of the premises is indebted to the plaintiff in a sum stated, and that the defendant is not a resident of the State. (Drake on Attach. 34, § 34; *Humphreys v. Matthews*, 11 Ill. 471; *Burger v. Griffin*, 2 La. Ann. 154.) *Assumpsit* is sustainable where there has been an express contract or where the law implies a contract. (1 Chitty's Pl. 112.) Where there is an express promise and a legal obligation results from it, then the plaintiff's cause is accurately described in *assumpsit*. (1 Chitty's Pl. 152.)

Douglass & Minton for respondents. The action is not "one to recover a sum of money only." (Code, § 635.) Attachment will not lie in actions of this nature. (*Ackroyd v. Ackroyd*, 20 How. Pr. 93; *Guilhon v. Linds*, 9 Bosw. 601; *Ketchum v. Ketchum*, 1 Abb. Pr. [N. S.] 157; *Kneeland on Attach.*, § 111.) It is necessary that facts sufficient to constitute a cause of action should be stated. (*Reilly v. Sisson*,

Opinion per Curiam.

31 Hun, 572.) 'It is essential that the affidavit should show that the plaintiffs are entitled to recover a specific sum. A general averment of damage is not sufficient. (*Golden G. C. Co. v. Jackson*, 13 Abb. N. C. 476; *Walts v. Nichols*, 32 Hun, 276.) The action, if not in equity, is one brought to recover "damages for a breach of contract." The affidavit, then, should have shown "that the plaintiffs are entitled to recover a sum stated therein, over and above all counter-claims known to them." (Code, § 636; *Lyon v. Blakely*, 19 Hun, 299; *Donnell v. Williams*, 21 id. 216; *Dickey v. Coe*, 13 Weekly Dig. 318; *Rupert v. Haug*, 87 N. Y. 141; *Murray v. Hankin*, 30 Hun, 37; *Gray v. Giles*, 2 Law Bull. 12.)

Per Curiam. The action here is in equity, and from the facts set forth in the affidavit the plaintiffs are only entitled to a judgment that the defendants hold the pine lands, therein mentioned, in trust for the plaintiffs, and that they convey the same to the plaintiffs, and that an accounting of their transactions be taken as trustees for the plaintiffs, and that they pay over the sum found due to them upon such accounting.

It is manifest that in such a case an attachment will not lie, within the provisions of section 635 of the Code of Civil Procedure. We are also of the opinion that the affidavit was insufficient, inasmuch as it did not state that a specific sum was due, over and above all counter-claims known to the plaintiffs, in accordance with the provisions of section 636 of the Code of Civil Procedure. It was upon this ground, as appears from the opinion, that the General Term affirmed the order vacating the attachment. The affidavit, on its face, does not show that the plaintiffs are entitled to more than nominal damages. It places no value upon the real estate mentioned therein, and for which the plaintiffs are called upon to account, but it simply alleges that it was of great value. It sets forth "that the amount of plaintiffs' claim in said action is, to-wit: \$10,000, or other larger sum, with interest from the 1st day of January, 1883, over and above all discounts and set-offs." The value of the property is the basis upon which the amount

Statement of case.

of the attachment is fixed, and this is, as we have seen, not specifically stated. The facts stated do not show that the plaintiffs are entitled to recover the sum named, or any sum whatever, and it is not alleged in the affidavit that they are entitled to recover any sum. It may also be observed that it was discretionary with the courts below, in view of the facts stated in the affidavit, to determine whether a case was made out for an attachment, and as the order of the Special Term and the order appealed from do not state the ground upon which the attachment was vacated, the decision may be upheld upon this ground.

The appeal should be dismissed.

All concur.

Appeal dismissed.

BOARD OF WATER COMMISSIONERS OF THE VILLAGE OF CLINTON,
Respondent, v. THEODORE W. DWIGHT et al., Appellants.

The act of 1885 (Chap. 17, Laws of 1885), entitled "An act for the relief of the village of Clinton," is not violative of the constitutional provision (State Const., art. 8, § 16), declaring that no private or local bill "shall embrace more than one subject and that shall be expressed in the title"; and said act was within the authority of the legislature and is valid.

Said act, although a local, is not a private one.

Where prior to the passage of said act proceedings had been commenced by the board of water commissioners of said village under the act of 1875 (Chap. 181, Laws of 1875), authorizing villages to furnish pure and wholesome water to their inhabitants, and an application for the appointment of commissioners to appraise damages had been denied at Special Term, on the ground of non-compliance with the requirements of the act last mentioned—*Held*, that the act of 1885 was properly before the General Term on appeal from the Special Term order, and rendered a decision upon the original proceedings unimportant; and that, therefore, a reversal of the order of Special Term with leave to make "application to the Special Term for the appointment of commissioners," was proper.

(Argued November 24, 1885; decided December 8, 1885.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made April 21, 1885, which reversed an order of Special Term, denying an application for the appointment of commissioners in proceedings under the act of 1875 (Chap. 181, Laws of 1875) to appraise the damages by reason of the taking of water from Miller creek to supply the village of Clinton. The General Term order authorized application to be made to the Special Term for the appointment of commissioners.

The material facts are stated in the opinion.

William Kernan for appellants. Chapter 17 of the Laws of 1885 is unconstitutional as violating article 3, section 16 of the State Constitution, which provides that no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title. (*Rochester v. Briggs*, 50 N. Y. 553; *Matter of Blodgett*, 89 id. 392.) The act under consideration is a "local" bill. (*People v. Supervisors*, 43 N. Y. 10; *Kerrigan v. Force*, 68 id. 383.) The General Term erred in resorting to chapter 17 of the Laws of 1885, passed since the argument before that court, as a ground for reversing the judgment at Special Term. A court cannot take "judicial notice" of a private statute. (1 Greenl. on Ev. [14th ed.] 8; *Broad S. H. Co. v. Weaver*, 57 Ala. 26; *Perdecaris v. Trenton*, 5 Dutch. [N. J.] 367; *Alleghany v. Nelson*, 25 Penn. St. 332; Code of Civ. Pro., § 530.) Documentary evidence can be put in evidence at the General Term, or even in the Court of Appeals, only to uphold a judgment, not to reverse it. (*Stillwell v. Carpenter*, 62 N. Y. 639; *Porter v. Waring*, 69 id. 250.) An appellate court can reverse a judgment only when it is shown that the court below erred in deciding the case on the evidence before it. (*Stillwell v. Carpenter*, 62 N. Y. 639; *Porter v. Waring*, 69 id. 250; *Bowrel v. Bigler*, 19 Ohio, 362; *The Grace Werdler*, 7 Wall. 196.)

C. D. Adams for respondent. The proceedings on the part

of the village or water commissioners, under the Laws of 1875, were legal and regular. (*Fleming v. Village of Suspension Bridge*, 92 N. Y. 368.) Chapter 17, Laws of 1885, was sufficient to cure any supposed irregularities or defects in such proceedings. (63 N. Y. 239, 244; 66 id. 129-137; 82 id. 204-210; Cooley on Const. Lim. 371, 379.)

DANFORTH, J. The proceeding was instituted by the board of water commissioners of the village of Clinton, for the purpose of acquiring water from Miller brook for the use and supply of that village. To that end, under section 6 of the act of 1875, entitled "An act to authorize the villages of the State of New York to furnish pure and wholesome water to the inhabitants thereof" (Chap. 181), they presented a petition to the Supreme Court, asking that commissioners be appointed to determine the damages sustained by its owners by reason "of the taking and use of said water." The application was opposed by them, and denied at Special Term upon the ground that certain provisions of the act of 1875 (*supra*) had not been complied with by the petitioners, but the decision was reversed at General Term, and leave given to make "application to the Special Term for the appointment of commissioners," upon the ground, as stated in the order, that the errors and omissions complained of were cured by the act of 1885 (Chap. 17), entitled "An act for the relief of the village of Clinton," and, therefore, it was deemed unnecessary for the court to examine the merits of the controversy.

The appellant contends that the court erred in giving that effect to the statute, saying, *first*, that it violates article 3, section 16, of the Constitution, which provides that "no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title."

It must be conceded that the words of the title are very general, but they are comprehensive and do express a single intent, which the body of the act neither exceeds nor contradicts. It has been held that the purpose of the provision was, that neither the members of the legislature nor the public should be misled by the title of an act, and thereby various objects, having

no necessary or natural connection with each other, be united in one bill. There is here neither that danger nor that result. The board of water commissioners represented the village of Clinton, and the irregularities complained of, and which, if they existed, rendered inoperative the commissioners' act, affected proceedings in which the village was alone interested, and by the non-completion of which they were prejudiced. The first section confirms and makes those acts effective and legal. The second section relates to the vote of the electors, without which, duly given, the commissioners had no power to proceed with any duty under the act of 1875 (*supra*). This vote and the certificate of the result, it (§ 2) declares valid and lawful, and authorizes and requires the commissioners to perform each duty and act imposed by the statute of 1875. The subject in each section and the enactment are for the relief of the village of Clinton, and we think that well expressed in the title, although it states neither the mode in which the subject is treated, nor the means by which the end is to be reached. (*Conner v. Mayor, etc.*, 1 Seld. 285; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. Lawrence*, 41 id. 137; *Gordon v. Cornes*, 47 id. 608.)

Other objections to the act of 1885 are made by the learned counsel for the appellant, but we think them untenable. Although a local, it is not a private act. It concerns a whole community and not particular persons nor a private enterprise. The act, therefore, was properly before the Supreme Court, and that court could not be required to pass upon the merits of the controversy, unaffected by it. (*Geer's Case*, 82 N. Y. 575.) The statute was within the authority of the legislature, and seems to have been passed to prevent public inconvenience. It is not denied by the appellant that, if valid, it cures the defects and errors under the original proceedings, and we do not consider them. But upon the ground that the act of 1885 is valid and sufficient, and a decision, therefore, upon the original proceedings unimportant, we think the order appealed from should be affirmed.

All concur.

Order affirmed.

MARGARET C. WALLACE, as Executrix, etc., Respondent, v.
ROBERT H. BERDELL et al., Appellants.

Where, on reversal of a judgment, this court directed immediate restitution of certain real estate of which one of the appellants had been dispossessed by means of the erroneous judgment, and that the *mesne* profits up to the time of the restitution be ascertained and paid to him, — *held*, the intent was to provide for the same compensation for withholding the real estate to which the appellant would have been entitled on recovering the same in an action of ejectment; and that an order entered upon the decision providing that "the value of the rents and profits" be ascertained was substantially in accord with the decision.

The provisions of the Code of Civil Procedure (§§ 1496, 1531), providing for recovery in an action of ejectment as damages for withholding the property, "the rents and profits, or the value of the use and occupation of the property," may be regarded as the legislative definition of the ancient technical term "*mesne* profits."

The owner of the property withheld is not confined to the rents actually received by the party required to make restitution. The owner should have either these or the rental value, as may be just under the circumstances.

The *mesne* profits consist of the net rents, rental value, or value of the use and occupation, and in ascertaining either, all necessary payments for taxes and ordinary repairs are to be deducted.

The order of restitution contained a provision not contained in the decision, to the effect that the restitution and payment should be without prejudice to the right of the owner to commence and maintain any suit or proceeding for waste or injury to the property. *Held*, that while perhaps the provision was superfluous, as it was not the intent of the court to deprive said owner of any such right of action, if he had any, the order as entered was proper.

(Argued December 1, 1895; decided December 8, 1895.)

MOTION to recall and amend remittitur etc.

The case is reported in 98 N. Y. 480.

Henry Bacon for motion.

Alfred Taylor opposed.

RAPALLO, J. The opinion in this case on the motion for restitution, after holding that the remittitur should be amended

by inserting a direction for the immediate restitution of the real estate in question, held that there should be inserted a further direction, that the *mesne* profits of said real estate, up to the time of such restitution, be ascertained and be paid by Ambrose S. Murray to Charles P. Berdell. (See 98 N. Y. 480.)

The order entered upon the decision of the motion, instead of following the words of the opinion, provided that the directions should be that "the value of the rents and profits, etc.," be ascertained.

The counsel for Mr. Murray seems to be apprehensive that this deviation from the language of the opinion may subject his client to liability for the gross rents or rental value of the property, without any allowance for amounts paid by him for taxes and necessary repairs, etc., and he now moves for a recall of the remittitur for the purpose of making the direction conform to the language of the opinion.

The intention of the court was to provide for the same compensation to the defendant for withholding from him the possession of his real estate, to which he would have been entitled on recovering the same in an action of ejectment, and we see no difference, in substance or effect, between the language of the opinion and that inserted in the order.

Whatever uncertainty there may have been in former times as to the rule of damages in an action for *mesne* profits, has been removed by the provisions of the Revised Statutes and of the Code of Civil Procedure and the decisions thereon.

At common law the action for *mesne* profits, after recovery in ejectment, was in the form of an action of trespass, and although the general rule was that the plaintiff was entitled to recover in such an action the annual value of the land, it was held in some cases that he was not confined to that, and it was said by the court in *Goodtitle v. Tombs* (3 Wils. 118): "The plaintiff is not confined in this case to the very *mesne* profits only, but he may recover for his trouble. I have known four times the value of the *mesne* profits given by a jury in this

Opinion of the Court, per RAPALLO, J.

sort of action of trespass. If it were not so, sometimes complete justice could not be done to the party injured."

In *Jackson v. Loomis* (4 Cowen, 168), which was an action of trespass for *mesne* profits after a recovery in ejectment, it was held that a defendant, whose possession was *bona fide*, was entitled to be allowed in mitigation of damages the value of permanent improvements, beneficial to the freehold, made in good faith. The court, by SAVAGE, Ch. J., after stating that it could find no case in point, either in this country or in England, cited, in support of its decision, from the opinion of KENT, J., in the Court of Errors, in *Murray v. Gouverneur* (2 Johns. Cas. 441.): "As to the sum expended for repairs, it may be left for liquidation, in an action for *mesne* profits, if the respondents should think proper to sue for the rents and profits. The action for *mesne* profits is a liberal and equitable one and will allow of every kind of equitable defense." The Revised Statutes (2 R. S. 310, § 44 *et seq.*), substitute, in place of the action of trespass for *mesne* profits, a suggestion to be entered on the record of the judgment in ejectment, and direct that such suggestion be in the form in use for a declaration in an action for use and occupation. Section 48 requires the plaintiff to prove on the trial of the issue, to be framed on such suggestion, the *value of the mesne profits* during the time for which the plaintiff is entitled to recover, and by section 49 allowances are directed to be made for permanent improvements and for the value of their use.

In *Woodhull v. Rosenthal* (61 N. Y. 394) the rule of damages is stated by DWIGHT, Commissioner, to be the *rental value* of the premises recovered; and the whole subject is provided for by the Code of Civil Procedure, which provides (§ 1496) that in an action to recover real property or the possession thereof, the plaintiff may demand in his complaint, and in a proper case recover, damages for withholding the property, and section 1497, that "those damages include the *rents and profits* or the *value* of the use and occupation of the property where either can be legally recovered," and section 1531 uses the same

Opinion of the Court, per RAPALLO, J.

language as to the amount of damages allowed in ejectment, viz.: "The rents and profits or the value of the use and occupation of the real property recovered," so this may be regarded as the legislative definition of the ancient technical term "*mesne profits*" used in the opinion. The term "*value of the rents*," employed in the order, does not essentially depart from this definition.

It would be manifestly unjust to confine the owner of the property withheld from him to the rents actually received by the party required to make restitution. The owner should have either those rents, or the rental value, as may be just under the circumstances. In either case, payments necessarily made for taxes and ordinary repairs would be involved in ascertaining the rents received or the rental value. The *mesne profits* consist of the net rents after deducting all necessary repairs and taxes, or the net rental value, or the value of the use and occupation. That is all of which the party from whom the possession has been withheld has been deprived. For this he should be made whole, and he should not suffer from any mismanagement, negligence or improvident expenditure by the party in possession. On the other hand he should not be relieved from any necessary diminution of the gross rents or rental value, or gross value of the use and occupation, to which he would have been himself subjected had he not been disturbed in his possession.

The amount justly chargeable for the rents which the owner derived, or might with reasonable diligence have derived from the property, and the amount of the expenditures which have been properly made and which the owner would have been obliged to make had he remained in possession, are matters to be determined by the referee.

The order contains a further provision which was not contained in the opinion, viz.: "That the restitution and payment ordered be without prejudice to the right of Charles P. Berdell to commence and maintain any suit or proceeding for waste or injury to the property, etc."

This provision determines no question in relation to any

Statement of case.

such action, but leaves the parties to their legal rights, whatever they may be. That under certain circumstances such an action may be brought, after recovery in ejectment, was decided by the court of errors in *Dewey v. Osborn* (4 Cow. 329). The provision in the order was perhaps superfluous, as no such damages could have been recovered in the proceeding for restitution. It was not intended to deprive Mr. Berdell of such right of action, if he had any, and we see no occasion for amending the order in that respect.

The motion should be denied without costs.

All concur.

Motion denied.

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HIRAM W. LANE, Appellant, v. JOSIAH H. WHEELER,
Respondent.

A notice of appeal to this court from an order granting a new trial, which does not contain an assent on the part of the appellant as required by the Code of Civil Procedure (Subd. 1, § 191) that, if the order is affirmed judgment absolute shall be rendered against him, is fatally defective.

Assuming that the time to appeal from an order granting a new trial might be extended by the facts that the appeal cannot be taken without leave of the General Term, and that such leave could not be obtained until the next General Term, the notice of appeal must at least be served within sixty days after leave is granted. It is immaterial that the appellant fails to enter the order granting leave; he cannot extend his time to appeal by delaying to enter an order obtained for himself, upon his own motion.

(Argued December 1, 1885; decided December 8, 1885.)

MOTION to dismiss appeal on the grounds that the notice of appeal is defective and was not served in time.

The material facts are stated in the opinion.

Cook & Lockwood for motion.

Smith & Fisher opposed.

Opinion *per Curiam*.

Per Curiam. The notice of appeal is defective because it does not contain an assent on the part of the appellant that, if the order is affirmed, judgment absolute shall be rendered against him, as required by subdivision 1 of section 191 of the Code.

The claim of the respondent is also well founded, that the notice of appeal was not served in time. The Code (§ 1325) requires that an appeal to this court from an order must be taken within sixty days after service upon the attorney for the appellant of a copy of the order appealed from, and a written notice of the entry thereof. A copy of the order with the written notice was served on the attorneys for the appellant on the 20th day of May, 1885, and the notice of appeal to this court was not filed with the clerk until October fourteenth, and was not served on the respondent's attorney until October sixteenth, nearly five months after the twentieth day of May. But the claim is made for the appellant, that the limitation of time for an appeal from an order, specified in section 1325, is not applicable to this case, because the appeal could not be taken without leave of the General Term, and that such leave could be obtained only at the next General Term, which was held in June, 1885. Assuming that the time to appeal might be extended by the circumstance mentioned, the notice of appeal must be served at least within a reasonable time after leave to appeal has been granted. Plaintiff's motion for leave to appeal was granted at the June General Term, and the decision was handed down July third. The appeal should have been taken, at least, within sixty days from that date, and yet it was delayed more than ninety days from that date. It matters not that the appellant did not enter a formal order granting leave to appeal until September first. He could not extend his time to appeal by delaying to enter an order obtained for himself upon his own motion. It is clear, therefore, that the appeal was not taken in time, and upon both grounds mentioned it should be dismissed, with costs.

All concur.

Appeal dismissed.

I. E. JEFFERSON, Plaintiff in Error, v. THE PEOPLE OF THE
STATE OF NEW YORK, Defendant in Error.

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Where the enacting clause of a statute, forbidding the doing of an act, contains one or more exceptions, an indictment for a violation of the statute must contain averments showing that the case is not within any of the exceptions; but an exception in a subsequent clause or statute is simply matter of defense, and it is not necessary to negative it in the indictment.

Accordingly *held*, that an indictment under the provision of the excise law of 1857 (Laws of 1857, chap. 625, § 14), prohibiting the sale of intoxicating liquors, to be drunk on the premises, without a license therefor, "as an inn, tavern or hotel-keeper," was sufficient which alleged a sale of certain specified liquors, among them ale and beer, without such a license, but did not negative a license, as authorized by the Amendatory Act of 1869, to sell ale and beer. (Laws of 1869, chap. 856, § 4.)

(Submitted December 1, 1885; decided December 15, 1885.)

ERROR to the General Term of the Supreme Court, in the fourth judicial department, to review judgment entered upon an order, made October 20, 1882, which affirmed a judgment of the Court of Sessions of Wyoming county, entered upon a verdict convicting plaintiff in error of a violation of the excise law. (Mem. of decision below, 28 Hun, 52.)

The questions discussed arose under the following count of the indictment:

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said I. E. Jefferson on the third day of May, in the year last aforesaid, at the town of Attica and in the county last aforesaid, with force and arms, did unlawfully sell divers strong, spirituous and intoxicating liquors and wines, to be drunk in the house, shop, and out-house of him, the said I. E. Jefferson there situate, that is to say: wines, whisky, beer, lager beer, Dutch beer, ale, gin, rum, brandy, and other strong, intoxicating and spirituous liquors to the jurors aforesaid unknown, without having obtained a license therefor as an inn, tavern or hotel-keeper, contrary to the form of the statute in such case provided," etc.

Opinion of the Court, per DANFORTH, J.

M. E. & E. M. Bartlett for plaintiff in error. The right to sell, to be drank on the premises, is expressly given to inn, tavern and hotel-keepers by chapter 625 of the Laws of 1857. (*O'Rourke v. People*, 3 Hun, 232.) The rule of pleading in indictments is "that a party pleading must show that his adversary is not within the exceptions." (*People v. Brown*, 6 Park. Cr. 66; Stark. Cr. Pl. 171.)

I. Sam Johnson, district attorney, for defendant in error. The motion to quash should have been made before the defendant entered his plea of not guilty. (1 Colby's Cr. Law. 269.) In statutory offenses it is always sufficient to charge in the indictment the offense in the words of the statute. (*People v. Adams*, 17 Wend. 275; *People v. Gilkenson*, 4 Park. 26; *Osgood v. People*, 39 N. Y. 449; *Huffstater v. People*, 5 Hun, 23.)

DANFORTH, J. The indictment in question was found in May, 1881, and as the Code of Criminal Procedure had not then taken effect (§ 963), it is to be construed without regard to the provisions of that act. It contains four counts. At the close of the evidence the court ruled that there could be no conviction under the first three counts, but against the exception of the defendant's counsel, submitted the case as one in which the defendant might be found guilty under the fourth count, saying to the jury: "You are only to consider whether or not the defendant, at the time and place mentioned in the indictment, sold strong, spirituous and intoxicating liquors, to be drank on his premises, without having a license therefor as an inn, tavern, or hotel-keeper." There was no exception to this charge, but it followed a denial of a motion by the defendant's counsel to direct a verdict of not guilty upon the indictment generally, and also an unsuccessful motion to quash the fourth count in the indictment, upon the ground, among other things, that it was not necessary to have a license as an inn, tavern, or hotel-keeper, "to sell, to be drank on his premises, all of the liquors mentioned in that count." The motion was denied, and the

exception then taken to the ruling of the court is the only error now relied upon.

The indictment was evidently drawn under section 14 of the act entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed in 1857, and constituting chapter 628 of the laws of that year. That section prohibits the sale of such liquors by any person "to be drank in his house, or shop, or any out-house, yard, or garden thereof, without having obtained a license therefor as an inn, tavern, or hotel-keeper," and it is obvious that if this were all, the appeal would be without merit, but in 1869, the act of 1857 was amended (Laws of 1869, chap. 856), and among other things, it was declared by section 4 that the provisions of the act of 1857 should be held "to apply to the sale of ale or beer, except so much thereof as forbids the granting a license to any person, except such persons as propose to keep an inn, tavern, or hotel, and the commissioners of excise were authorized, in their discretion, to grant a license for the sale of ale or beer to persons other than those who proposed to keep an inn, tavern, or hotel." By these provisions, the operation of the act of 1857 was restricted (*People v. Smith*, 69 N. Y. 175) and a new exception added to that already given by section 14 of that act, so that a person might sell ale or beer, to be drank upon his premises, if he either kept a tavern there, or had been licensed under the act of 1869.

It is not suggested by counsel on either side that the act of 1870 (Chap. 175), regulating the sale of intoxicating liquors, has in any respect contravened the provisions of the acts of 1857 and 1869, to which I have referred. The precise objection raised by the learned counsel for the appellant is that the indictment does not allege in form or substance, that defendant had not permission to sell ale or beer; and as such articles are enumerated among those alleged to have been sold, he contends that the indictment should have negatived the exception made by the act of 1869 (*supra*).

It is no doubt a general rule that if a statute forbids the doing of any act, without the authority of either one of two

Opinion of the Court, per DANFORTH, J.

things, the indictment must negative the existence of both before it can be supported, and it is well settled that if exceptions are stated in the enacting clause, it would be necessary to negative them in order that the description of the crime may correspond with the statute, but if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the defendant.

It has, therefore, been held that, where the statute imposes a penalty on the selling of spirituous liquors without a license, it is necessary to aver the want of a license in the indictment. But in *Heming v. People* (27 N. Y. 329), it was said to be unnecessary in an indictment for bigamy to negative certain exceptions, although they were referred to in a section defining the offense, and that, as matter of pleading as well as proof, it was for the defendant to bring himself within the exceptions; and as illustrating that rule, the court referred to the case of a physician practising without a license, and the selling spirituous liquors without a license, saying, the prosecution need not prove the want of qualification. It was also held that the omission of such allegations was within the meaning of the Revised Statutes, which declare that no indictment shall be deemed invalid by reason of any defect or imperfection in matters of form, other than those which are enumerated, which shall not tend to the prejudice of the defendant.

In either view, therefore, the case was well disposed of. The act of 1869 extended the authority of the commissioners to grant a license for the sale of ale or beer, and affected many of the provisions of the act of 1857. But the indictment contains the language of section fourteen of that act, and stated an offense. We think that was enough.

The defendant was at liberty to show either that he had a license to sell strong or spirituous liquors, as provided in the fourteenth section of the act of 1857, or a license for the selling of ale or beer under the act of 1869. He did neither. The record shows that the evidence on the part of the people tended to prove that the defendant sold strong and intoxicating liquors in quantities less than five gallons, to be drank on his premises,

Statement of case.

and that the same were so drank on his premises, and rested. The character of the liquor does not appear, but the defendant then proved by the admission of the district attorney that he had a license covering the periods alleged in the indictment, and mentioned in the evidence, "for the sale of strong and spirituous liquors in quantities less than five gallons, not to be drank on the premises." No other evidence was given by him, and it is clear that he neither negated the exception in section 14 of the act of 1857, nor brought himself within the proviso or condition of section 4, of the act of 1869. Under the circumstances, the court committed no error, and the judgment rendered upon the conviction was properly affirmed by the General Term.

The judgment appealed from should, therefore, be affirmed.

All concur.

Judgment affirmed.

JAMES J. O'DEA, Appellant, v. MARY O'DEA, Respondent.

In July, 1844, defendant, who was then residing in Toronto, Canada, married K., in this State and lived with him here as his wife until January, 1860, when she left him and returned to Toronto, where she continued to reside until 1865. K. removed to, and became a resident of Ohio, and in 1864, after a residence there of more than a year, he commenced an action in that State for divorce on the ground that defendant had been willfully absent from him for more than three years. A copy of the petition and summons were mailed to defendant at Toronto, and were received by her. Notice of the filing of the petition, the purpose thereof, the time for hearing, and that depositions would be taken at Toronto at a time and place named, was duly published. Depositions were taken in pursuance of said notice, defendant being present but taking no part personally or by counsel. No other service was made upon defendant; the service made was, under the laws of Ohio, a legal service. A divorce was granted in 1864. By the terms of the decree, each party was "restored to the rights and privileges of unmarried persons." Defendant afterward married the plaintiff, and they lived together as husband and wife until 1880. Plaintiff, prior to his marriage, knew of defendant's former marriage and of the divorce proceedings, but not of the particular circumstances under which the decree of divorce was obtained. At the time of such marriage

101	28
106	424
106	425
106	630

101	23
127	413

101	28
130	190

101	28
155	71

j 155	72
155	184

101	28
f 164	9

101	23
f 165	555

101	2
173	50

Statement of case.

K. was and is still living in Ohio. In an action to have the marriage between the parties annulled, on the ground that defendant, at the time of such marriage, had a husband living, and that her former marriage was still in full force, *held* (MILLER, DANFORTH and FINCH, JJ., dissenting), that the Ohio court acquired no jurisdiction over the defendant and the decree of divorce was, as to her, inoperative and void; that, therefore, the marriage between her and plaintiff was illegal and void.

Argued October 12, 1885 ; decided December 22, 1885.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made the second Tuesday of June, 1883, which reversed a judgment in favor of plaintiff entered upon the report of a referee.

The complaint in this action alleges and it was proved that the parties intermarried in this State on the 30th day of August, 1866, and from that time until shortly before the commencement of the action in 1880, lived and cohabited together as man and wife. The husband sued to have the marriage contract declared void and the marriage annulled upon the ground that at the time it took place a former husband of the defendant was living and the marriage with him was then in full force. The defendant by answer denied all the criminatory allegations.

The referee before whom the issue was tried found upon evidence sufficient, if admissible, that in July, 1844, the defendant resided in, and always before that time had been a resident of, Toronto, Canada West, but at that date was married in Lewiston, in this State, to one K. and lived with him as his wife until January, 1860, when she left him and returned to Toronto, where she continued to reside until 1865, and he removed from this State "to, and became a resident of, Cuyahoga county in the State of Ohio," where in March, 1864, and after a residence of more than one year, he commenced an action in the Court of Common Pleas of that county, "for the purpose of obtaining a divorce from the defendant in this action, for the reason, as stated in the petition then filed, that she had been willfully absent from him for three years or more. That a copy of this petition and of the summons issued thereupon were on

Statement of case.

the 24th of March, 1864, sent, by mail, to the defendant at Toronto, where she then resided, and were received by her soon after, that by said summons she was required to answer in the action by the 9th day of April, 1864. That a notice of the filing of the petition, and of the purpose thereof, and that said petition would be presented for hearing at the May Term of said court of Common Pleas, and that depositions would be taken in Toronto at a time and place mentioned, were duly published in a newspaper in said Cuyahoga county. "That on the 20th day of April, 1864, depositions in said action were taken in pursuance of said notice. That the defendant was present when such depositions were taken, but took no part personally, or by counsel, at the taking of the same. That no other service of the process or proceedings in the action was made upon the defendant than is above stated; and that such service so made was, according to the Laws of the State of Ohio, a legal service upon the defendant, but that she never in any way appeared in said action."

It also appeared that on the 24th day of May, 1864, the Ohio court, upon the proofs, found the facts stated in the petition to be true, that the defendant was willfully absent from the petitioner without cause, for more than three years anterior to the filing of the petition, and had at all times remained so willfully absent from him, and therefore it was decreed that the marriage contract alleged in petition, and heretofore existing between the parties, be and the same was "declared annulled, cancelled and void, and no longer binding on the parties," and each was "restored to the rights and privileges of unmarried persons." The referee further found that the defendant afterward married the plaintiff and lived with him as above stated. It appeared from uncontradicted evidence that plaintiff knew the person he was about to marry had been a wife and was not a widow; that he also knew of the divorce proceeding during its pendency, and in 1864 was informed of the result, but the referee finds that "he had no knowledge of the particular manner or circumstances under which the divorce was obtained," and that when

Statement of case.

the plaintiff and defendant married, K. was living in Ohio and is still living there.

As conclusions of law the learned referee found that the Court "of Common Pleas of Cuyahoga county, Ohio, never acquired jurisdiction over the person of the defendant in the proceeding prosecuted in that court, and therefore that the decree made and entered in it was without jurisdiction and so void and of no effect." He directed judgment in favor of the plaintiff, declaring his marriage with the defendant to be illegal and void.

George J. Greenfield, for appellant. A suit to dissolve a marriage is a proceeding *in personam* and not *in rem*. (*People v. Baker*, 76 N. Y. 78; *Hunt v. Hunt*, 72 id. 217.) To sustain a foreign divorce, jurisdiction of the person of the defendant, not a resident of that State, must be acquired, as in any other action, by the personal service of the summons within the territorial jurisdiction of the court, or by voluntary appearance. (*Borden v. Fitch*, 15 Johns. 12; *Shumway v. Stillman*, 6 Wend. 447; *Bradshaw v. Heath*, 13 id. 407; *Vischer v. Vischer*, 12 Barb. 640; *McGiffert v. McGiffert*, 31 id. 69, *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 id. 30; *Todd v. Kerr*, 42 Barb. 317; *Moe v. Moe*, 2 T. & C. 647; *Phelps v. Baker*, 60 Barb. 107; *People v. Baker*, 76 N. Y. 78.) The alleged desertion of her husband, Kollmyer, by the defendant, occurred in this State, before Kollmyer removed to Ohio, and acquired a domicile there. Such desertion was not a valid ground of divorce in this State, and jurisdiction was not acquired by the Ohio court. (*Holmes v. Holmes*, 4 Lans. 388; *Moe v. Moe*, 2 T. & C. 647; 3 Am. L. Reg. [N. S.] 193.) The actual notice of the Ohio suit, and the presence of the defendant at the taking of testimony in Toronto, did not confer jurisdiction on the Ohio court. (*Shepard v. Wright*, 60 How. 512; *Holmes v. Holmes*, 4 Lans. 388; *Dunn v. Dunn*, 4 Paige, 425; *Shetzler v. Shetzler*, 2 Ed. Ch. 584; *Fenton v. Garlick*, 8 Johns. 94; *Phelps v. Baker*, 60 Barb. 107; *Jones v. Jones*, 36 Hun, 414; *Ewer v. Coffin*, 1 Cush. 23; Whart. Conf. of Law, § 649; Conf. of Law affecting marriage

Statement of case.

and divorce by Judge REDFIELD, 3 Am. L. Reg. (N. S.) 210; *Irby v. Wilson*, 1 Dev. and Bat. Eq. 568; *Prosser v. Warner*, 47 Vt. 667; *Reed v. Reed*, 52 Mich. 117; *Wetherbe v. Wetherbe*, 20 Wis. 499; *Lyon v. Lyon*, 2 Gray, 367; *Garner v. Garner*, 56 Md. 127; *Pennoyer v. Neff*, 95 U. S. 714; *Price v. Hickok*, 39 Vt. 292; *Bischoff v. Withen*, 9 Wall. 812; *Flower v. Parker*, 3 Mason, 251; *Reel v. Elder*, 62 Penn. 308; *Hart v. Sumson*, 110 U. S. 151; *Penn v. Hayward*, 14 Ohio St., 302; *Williams v. Wilton*, 25 id. 451.) Mere acquiescence in a void decree does not render it binding on the defendant. (*Holmes v. Holmes*, 4 Lans. 388; *Todd v. Kerr*, 42 Barb. 317; *Jones v. Jones*, 36 Hun, 414.) Even if the Canada law should come in question, it cannot, in the absence of evidence, be presumed that it is contrary to the law of this State or the principles of natural justice. (*Shepard v. Wright*, 60 How. 512.) The defendant was not subject to the jurisdiction of the Ohio court. (*Mellen v. Mellen*, 10 Abb. N. C. 331, 333; *Hunt v. Hunt*, 72 N. Y. 243; *Cheever v. Wilson*, 9 Wall. 108; Story's Confl. of Laws (8th ed.), 311; *Dutcher v. Dutcher*, 39 Wis. 651; *Schonwald v. Schonwald*, 2 Jones Eq. (N. C.) 367; *Colvin v. Reed*, 55 Penn. St. 375; *Reel v. Elder*, 62 id. 308; *Irby v. Wilson*, 1 Dev. and Bat. Eq. (N. C.) 568; *Briggs v. Briggs*, L. R., 5 P. D. 163; *Harvey v. Farnie*, 6 id. 35; *Pitt v. Pitt*, 4 Macq. 640.) The plaintiff has a standing in court, and is not estopped by reason of his knowledge of the divorce decree. (*Kinnier v. Kinnier*, 45 N. Y. 543; *Singer v. Singer*, 41 Barb. 139; *Wilmon v. Flack*, 96 N. Y. 520; *Thorp v. Thorp*, 90 N. Y. 602; *Smith v. Smith*, 79 Mass. 210; *Holmes v. Holmes*, 4 Lans. 392; *Todd v. Kerr*, 42 Barb. 317; *Collins v. Collins*, 80 N. Y. 1; *Mann v. Mann*, 75 id. 614.)

DeLancey Crittenden for respondent. As a basis for relief the plaintiff in an action to annul a marriage, upon the ground that the former husband was living, must establish the fact that the former marriage was in force at the time of the commencement of his action. (Code of Civ. Pro., § 1743; *Roberts v. O.*

Statement of case.

& *L. C. R. R. Co.*, 34 Hun, 324; *Moore v. Hegeman*, 92 N. Y. 521.) The court in Ohio, or in this State, were Kollmyer to seek relief, would not permit him to question that divorce. (*Kinnier v. Kinnier*, 45 N. Y. 535; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Elliott v. Wohlfrom*, 6 So. Law Rev. [N. S.] 618.) Were Kollmyer to die during the defendant's life, the courts would not listen to a claim that she held the status of widowhood. (*Whitsell v. Mills*, 6 Ind. 229; *Claim of Burr*, 11 Opin. Att'y-Gen'l, 1; *William's Appeal*, 92 Penn. St. 69; *In re Ensign*, 32 Alb. L. J. 262; *Moore v. Hegeman*, 92 N. Y. 522; *Roth v. Roth*, 104 Ill. 48.) Upon the granting of the decree respondent had no former husband living, and at the time of her marriage in this State she was not a wife of her former husband, for dower or distribution, in his real or personal property. (2 Bish. on Mar. and Div. § 705; 2 id. [6th ed.], §§ 165, 166, 167; *People v. Baker*, 76 N. Y. 78.) Full jurisdiction in the Ohio court was conferred over both parties to that action. (*Hunt v. Hunt*, 72 N. Y. 242; *Kinnier v. Kinnier*, 45 id. 540; *Lange v. Benedict*, 73 id. 26; *Pennoyer v. Neff*, 95 U. S. 727; *Williams v. Armroyd*, 7 Cranch, 423; Whar. Conf. of Laws, §§ 236, 237.) Respondent had no election to treat "at her pleasure" the judicial decree, as legal or illegal, as her feelings or interests should dictate. Status of the parties was controlled by the law of the Nation or State in which the domicile had been gained. (*People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 304; *Thornton v. W. Ry. Co.*, 81 id. 467; *Powers v. Benedict*, 88 id. 609.) Full faith is to be given the decree and judicial proceedings of the State of Ohio in the action between the parties to such former marriage, wherein the defendant was respondent and upon which not only she but the plaintiff in that action and the appellant here have each and all relied, given full faith and credit and acted. (Swan & Critch. Stat. of Ohio, 1 R. S., chap. 37, 509, 510, 511, §§ 1, 3, 4, 5, 6, 8, 15; note 2, § 3, 511.) That State had supreme and unlimited control over the status of its citizen, and the marital relation, as it affects the citizen, forms part of his status. (*Strader v.*

Opinion *per Curiam*.

Graham, 10 How. [U. S.] 82; *Pennoyer v. Neff*, 95 U. S. 714; *Cheever v. Wilson*, 9 Wall. 108.) To banish the idea of secrecy and fraud, notice of some character is required. (*People v. T. H. Car Co.*, 87 N. Y. 140.) Abstruse definition is not required as to what constitutes "actual notice," respondent's receipt of the process having been a fact, and actual notice given to and served upon her, she being the sole defendant and the only person to be affected by it. (*Williamson v. Brown*, 15 N. Y. 354; *Parker Mills v. Jacot*, 8 Bosw. 175.) The respondent's status and matrimonial relation *pendente lite* and upon the entry of the decree dissolving her marriage was not that of a citizen of the State of New York, nor was it sought to affect the *rem* there. (*Ennis v. Smith*, 14 How. [U. S.] 400; *Roth v. Roth*, 104 Ill. 46; *Hunt v. Hunt*, 72 N. Y. 217; *Kinnier v. Kinnier*, 45 id. 535; *Williams v. Armroyd*, 7 Cranch, 423; *Roth v. Ehman*, 104 Ill. 35; Story's Conf. of Laws, §§ 223-4, 228, 230; Whar. Conf. of Laws, § 211; Bish. on Mar. & Div. [5th rev. ed.] 113, 113a, 162, 164.) All the matters involved in the Ohio action are *res adjudicata*. (*Kamp v. Kamp*, 59 N. Y. 215.) This marriage of respondent and appellant is neither *contra bonos mores*, nor in any manner void at law or upon application of equities or good conscience. (*Singer v. Singer*, 41 Barb. 139; *Nichols v. Nichols*, 25 N. J. Eq. 60.) By reason of his *laches* creating estoppel, the conclusive judgment dissolving the former marriage, unaffected by any act of either party to that action, plaintiff cannot recover. (*Kinnier v. Kinnier*, 45 N. Y. 535; *Simmons v. Simmons*, 37 Hun, 551; *Hynes v. McDermott*, 91 N. Y. 451; 20 Weekly Dig. 522.)

Per Curiam. We think the case of *People v. Baker* (76 N. Y. 78), is conclusive on the question brought up by this appeal, viz.: Whether the court in the State of Ohio had jurisdiction to try the issue raised by the petition of K., as between him and his wife, she then being a non-resident of Ohio, and never a resident of that State, nor at any time there served with process of the court. There are some differences in the detail of

Dissenting opinion, per DANFORTH, J.

the circumstances of the two cases, but we think not enough to lead to any change in the result, nor sufficient to require a reconsideration of the law affecting it. The *Baker Case* was of great importance, involving, as it did, the liberty of a citizen; it was most fully argued, and we do not perceive that the discussion in the case at bar has developed any new principle, or brought to light any authority which was not then weighed by us. We do not think the question can be more fully investigated. Concerning the result there was, it is true, a dissent by the late learned chief judge, and the opinion recognized the fact that in other States, judgments contrary to the authorities followed in this State had been rendered. This conflict of opinion, however much to be regretted, continues, and it yet remains for some ultimate authority to relieve the point from the difficulties now attending it, and determine the civil rights of parties whose relations, as legally defined by different State tribunals, are liable to be regarded on one side of the State line as matrimonial, and on the other side as meretricious. Adhering, however, to the rule established in this State, a majority of the court are of opinion that the order appealed from should be reversed and the judgment of the Special Term affirmed, but without costs.

DANFORTH, J. (dissenting). The jurisdiction of the Supreme Court to grant the relief sought for in this action is purely statutory (Code, § 1745), and depends upon the existence of two facts there stated, and in substance repeated in the complaint. *First*. That the former husband was living at the time of the marriage in question; and *second*, that the marriage between that former husband and the defendant was then in force. As to the first there is, upon the evidence, no dispute. The controversy is over the second, and is to be determined as effect is given or denied to the judgment rendered by the Ohio court. In *Kinnier v. Kinnier* (45 N. Y. 535), full effect was given to a judgment of divorce granted by a sister State, although for a cause not deemed sufficient in this State, while in *People v. Baker* (76 N. Y. 82), it did not avail the defend-

Dissenting opinion, per DANFORTH, J.

ant who set it up. In the *Kinnier Case* the plaintiff was the second husband and unsuccessfully invoked the judgment of the courts of this State to annul his marriage. There both parties to the divorce proceedings were in the State when they were had, and parties to the suit. In the *Baker Case* the defendant was served with process by publication only, and his second marriage was held to be bigamous. The present suit was commenced soon after the determination of the *Baker Case*, and as stated on the argument, was suggested by it. The learned counsel for the appellant now relies upon it as furnishing a decisive answer to the decision of the court below.

The judgment in *Baker's Case* (76 N. Y. 78) was in assumed compliance with the rule theretofore uniformly laid down by the courts of this State, and is to be followed as a precedent in similar cases, but it should be taken in connection with the facts which seemed to warrant it, and so taking it, I feel at liberty to dissent from the conclusion of the majority of the court in the one at bar, and more readily because a limitation to the doctrine appears to have been in the mind of the court in that instance.

In the language of the learned judge, whose opinion declared the views of his brethren, "it presents this question: Can a court, in another State, adjudge to be dissolved and at an end, the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in his State.

"We assume, in putting this proposition," says the learned judge, "that the defendant in error was in the situation therein stated." "We think," he adds, "that it may properly be thus assumed;" and that importance was attached to this assumed situation of Baker, is apparent, not only from the care taken in stating the proposition, but by the argument by which it is sustained in the face of some evidence to the contrary. It appears, then, in the *Baker Case*, *first*, that the person whose rights the court in Ohio sought to affect is not only character-

Dissenting opinion, per DANFORTH, J.

ized as being at the time a citizen of this State, but as one actually abiding here during the judicial proceedings which were aimed at him. In the case at bar, the defendant in the divorce suit was neither domiciled nor a resident in this State, nor was she within its borders during the pendency of the proceedings therein. She was either domiciled in Ohio, because her husband's domicile was there, or she was domiciled in Canada, to which place she went, and where she resided. The latter place, it is said, was her domicile of choice. Assuming that to be so, that her husband's domicile was in Ohio, and her own in Canada, the question is whether the proceedings instituted by him were valid by the laws of those two places. Valid by the laws of Ohio they are conceded to have been, and there is no finding or evidence that they were not valid, also, by the laws of Canada. *Second.* In the next place there was in the *Baker Case* no notice of the proceedings save by publication. It is clearly implied in the proposition I have quoted, that if, *first*, the defendant had voluntarily appeared in the divorce suit; or, *second*, been personally served with process in the State where it was pending; or, *third*, had actual notice of the suit, a different conclusion would have been warranted, and effect given to the judgment of the Ohio court.

The whole argument of the learned judge was to show that the admission of the judgment of a court of a sister State, to credit and effect in another, was subject to limitations, and that it could be received only when it did not violate those principles which morality, or its standard of public policy, or municipal regulations require to be specially observed in the State in which the party relying on the foreign judgment had chosen to introduce it. "There is no principle of comity," he says, "which demands more," and so the ultimate question is treated by him as one of expediency, but requiring nevertheless the rule of the foreign law to be adopted, "*Quatenus sine prejudicio indulgenter fieri potest.*" It was not intended to deny the well-settled rule that where judgment has gone against a party in the State of his residence, or where not being a resident he has voluntarily appeared in the action, or

Dissenting opinion, per DANFORTH, J.

where he has been served with process within the State where the action is pending, and so has been brought under the authority of its courts, then under the provisions of the Constitution (Art. 4, § 1) and the act of Congress (U. S. R. S., § 905), the judgment is of the same force and validity in other States as in the one where it was rendered. But where the jurisdiction of the court rests only on the fact that the moving party had his domicile within such jurisdiction, its claim to recognition in other States rests on the ground of comity, and this cannot prevail where the judgment sought to be accredited has been rendered without giving the party to be affected an opportunity to be heard. But as I understand the *Baker Case*, it concedes that this rule does not inexorably require either service of process or voluntary appearance, but may be satisfied when the party has in any way been given an opportunity of being heard before judgment, or in the language of the third condition of the question stated (*supra*) in the *Baker Case*, has had "actual notice" of the judicial proceedings.

In *Doughty v. Doughty* (N. J. Eq. Rep., 12 C. E. Gr. 315 ; 1 Stew. 581, 582), the court treat the question of jurisdiction in a divorce suit, arising out of the status and domicile of one of the parties, in the same spirit in which it is treated in *Baker's Case* (*supra*), and cite the New York authorities, but the court say : "A judgment of divorce, proceeding from a jurisdiction founded on domicile, would not contravene essential rules of natural justice if actual notice to appear had been served on the defendant residing abroad. It is true that a notice so served on a litigant, out of the jurisdiction in which a suit is pending, may add nothing to the judicial right to take cognizance over the cause, but, nevertheless, it may impart a quality to the resulting judgment that will serve as a credential to it in a foreign jurisdiction," and refuse to accept the one then in question for reasons like those given in *Baker's Case*, saying : "the residence of the defendant to it was known ; she was not summoned ; she did not appear, and she was not served with process, nor was notice given to her." Indeed as the object of all service is to give notice to the party on whom it is made, that he may be

Dissenting opinion, per DANFORTH, J.

aware of, and may resist the relief sought against him; when that is substantially done, so that the court may feel confident that service has reached him, it would seem that everything has been done that is required.

This is said in *Gibbs v. Ins. Co.* (63 N. Y. 114, 127), and is repeated in *Pope's Case* (87 N. Y. 137, 140) with the addition, that any service which reasonably accomplishes that end answers the requirements of natural justice and fundamental law. Indeed it is difficult to see how it could be otherwise. We hold it enough within the strictest rule to serve process upon a defendant, although he is in transit — passing through the State, neither abiding here, nor having any intention to remain. Of what less real and substantial efficacy for all beneficial purposes is the actual delivery of the paper outside the limits of the State? So, as against a domiciled citizen of a State, a judgment rendered upon such substituted service is by the law of the State permitted, although he is in fact absent. And it is valid and binding upon him, though he is actually abiding in another State, and has neither appeared in the suit, nor had actual notice of it. His absence, whether temporary or prolonged, makes no difference. (*Hunt v. Hunt*, 72 N. Y. 217.) The same principle of comity is applied in favor of one claiming title under a foreign law, as *In re Waite* (99 N. Y. 433), where after a most exhaustive and elaborate examination of authorities it was decided upon those and upon principle, that while the statutes of foreign States have no force or effect within this State, and hence the statutory title of foreign assignees in bankruptcy can have no recognition by virtue merely of its origin, yet, that the comity of nations permits a certain effect to be given to titles so derived, when it can be allowed without injustice to our own citizens. So in many other instances effect is given by way of comity to the laws of other States, as in recognizing an administrator or guardian appointed under another jurisdiction. He may not act *de jure*, but it does not follow that his claim to property or to the care of a minor is to be denied.

In the case at bar it was shown that the process from the

Dissenting opinion, per DANFORTH, J.

Ohio court was actually delivered to the defendant and received by her, and moreover that she was personally present at the taking of depositions in the case on the part of the plaintiff, going thither, the proof is, "because she had been notified." Now although it may be said that, within the strict rules of law, she was not made a party to the adjudication, it cannot be doubted that under the argument in the *Baker Case*, and the authorities to which I have referred, the defendant had all the notice which reason and natural justice requires should be given and that by it all danger of imposition upon the party or the court was excluded.

Third. In another respect, although of much less importance, there is another difference to be noted in the relation of the two cases to our law. At the time of the decision of the *Baker Case* (January 21, 1879), an order for service by publication, or without the State, in a divorce case, could only be had "where the defendant is a resident of the State" (Code of Civil Proc., § 433, subd. 4), and to that fact reference was made in the opinion; but those words were by a subsequent amendment (Laws of 1879, chap. 542) stricken out and the law restored to its original condition, so that now judgment in this State may be rendered against a non-resident defendant in a matrimonial action, either for a separation, a divorce absolute, or an annulment of a marriage, upon service of the process upon him or her outside of the State, or by publication.

It is apparent, therefore, that the subject was before the legislature for deliberate examination, and their conclusion will not permit us to say that public policy is opposed to such proceedings as those in Ohio, now under review, for it authorizes the doing in this State of the same thing, in the same manner and with the same object. Moreover, as if to remove any inequality in applying it, and relieve the married woman from the traction of that legal fiction by which she is supposed to follow and be with the husband, although, in fact, separated by intervening continents, it provides that if she dwells within the State when she commences an action for divorce or for separation, she is deemed a resident thereof, although her husband

Dissenting opinion, per DANFORTH, J.

resides elsewhere (§ 1768). It also directs judgment when default occurs in appearing or pleading, whether the summons and complaint has been personally served in the State, or whether service has been made by publication, and this is so whether the action is to annul the marriage, or for a divorce, or a separation. (§ 1774.)

The law of procedure under which the Ohio court acted was precisely like our own, and I can find no circumstances in the case which require us to depart from the rules of comity, which exact consideration for the laws and judicial proceedings of other States, and on which we depend for respect to our own. I have so far looked at the case from the appellant's stand-point, and treated the rights of the respondent as if she had made herself in Canada a domicile separate from that of her husband. Even in that view, the learned court below committed no error in holding that there was no substantial ground upon which the plaintiff could invoke its interference, and that the case was not one which required the marriage between these parties to be annulled. But another, and I think correct statement, of the respondent's position, permits us to say that her domicile was, at the time of the divorce proceedings, with her husband in the State of Ohio, and in that respect also the case differs from the *Baker Case*.

Except as altered by statute, the rule of the common law, which identifies the married woman with her husband, is adhered to by the courts of this State, and upon the question now before us, its decisions require us to hold that the domicile of the husband is *prima facie* that of the wife, not only because the home of one is the home of the other, but because it is her duty to go with him where he goes, and dwell with him where he dwells. Indeed under the maxim referred to it could not be otherwise. One in person, and that person the husband, the common law by no fiction could give her a separate domicile, nor even admit of its possibility. Therefore in *Baker's Case*, the wife, plaintiff in the divorce proceedings, in theory of law had her domicile with her husband, and thus both were residents and citizens of this State. In the case

Dissenting opinion, per DANFORTH, J.

before us, the husband was a legal citizen of Ohio, and the defendant's domicile, by virtue of the same theory, also in that State.

But in *Hunt v. Hunt* (*supra*) it is said that "from necessity, she may in certain cases have a domicile in another jurisdiction than that of her husband, as when they are living apart under a judicial decree of separation, or when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce," and so the reason of the rule weakens in power when in extreme cases the conduct of the husband has been such as to make it proper for the wife to seek relief from her obligation to have the same home and interest with him, and altogether ceases when a judicial decree has separated and adjudged them to live apart. These exceptions are justified, the first upon the ground that otherwise "the husband might constantly change his domicile, and drawing that of his wife after him, prevent her finding a court having that jurisdiction of person which would enable her to try her suit for redress and relief.

"It is evident," says the learned judge, "that this reason," by which I understand him to mean the *reason of the rule*, viz.: the theoretic identity of person and of interest between the husband and the wife in the eye of the law, "will also operate in favor of the husband, so that where he has ground for a suit by reason of the misconduct of the wife, she may not so often change her domicile as to baffle him in his pursuit of a remedy." Now in the case before us no ground can be found, upon which either exception can be placed. By deliberate stipulation in this case, it is conceded that defendant in the Ohio suit—that is the wife, left her husband, the plaintiff in that suit. No fault or error in behavior, or bad treatment on his part is suggested. On the contrary, the record shows that at the time of the commencement of the suit in December, 1864, she had been willfully absent from him for more than three years; that he had applied to her to live with him, and she had refused to do so; that always while they lived together, he had provided well for her and treated her properly.

Dissenting opinion, per DANFORTH, J.

The referee also finds that she left her husband. He did not go to Ohio to evade the law, nor to procure a divorce, nor to draw her from a friendly jurisdiction. She left him. He went to Ohio in good faith to reside and acquire a domicile, and he has since resided there, now nearly twenty years. So far as appears he was without fault, and the removal of his wife entirely without cause, and willful. Upon what ground then has she acquired a separate domicile?

The chief case cited by the appellant is *Borden v. Fitch* (15 Johns. 121), which is relied upon as "an express decision, to the effect that the acquisition of a new domicile by the husband does not draw the wife into the same jurisdiction." It furnishes no exception to the rule laid down in *Hunt v. Hunt* (*supra*). Fitch and his wife were inhabitants of, and domiciled in Connecticut; they lived together there until October, 1808, when upon her application and notice, and after appearance, and contest by him, the general assembly of that State, for abundant cause, decreed a separation at her pleasure, with, to her, "the privileges of a *feme sole*," and alimony to be paid by him annually. At all times after she continued to reside there, but in 1813, upon an allegation that she had willfully deserted him, he obtained, in Vermont, a decree of divorce. He afterward married in this State, and was shortly after sued by the second wife's mother for debauching her daughter. He relied upon the Vermont divorce, but without success, the court holding that the act of the legislature of Connecticut should be deemed a divorce *a mensa et thoro*, and involved a legal separation, and so the case was brought within the first exception I have referred to, viz.: a separation by judicial decree, or what is of equal or greater effect, a legislative enactment.

I do not think it necessary to inquire how the case would stand if the husband had deserted his wife; such a case is not before us. Until we are prepared to give up the common-law rule as respects the relation and unity of man and wife, we cannot hold that the wife at her pleasure, and without cause, may establish a separate residence or a domicile beyond the

Dissenting opinion, per DANFORTH, J.

man's control. It may be conceded that a judgment, obtained as was the one we have considered, would be of no effect as against the person, nor as one in *rem*, except as it was enforced or took effect within the State, but it cannot be doubted that the courts of Ohio had jurisdiction over the plaintiff K. and over the subject-matter of the suit there instituted by him. The judgment had force within that State, not only as to him, but the defendant should she go therein. No marital right could be claimed by her. Moreover by marriage a status is acquired which implies not only membership in a family, with certain rights, but a relationship in which the State is interested, and which therefore is subject to its control. And however regarded it is apparent that a judgment in the rendering of which the court exercised such jurisdiction as it did in this case, must have a very different influence from one of any other character. The distinction is conceded in the cases before referred to (*Hunt v. Hunt*; *People v. Baker, supra*), and distinctly declared in *Pennoyer v. Neff* (95 U. S. Rep. 714.), where the effect of judgments obtained without personal service of process, in actions against the person, or property, or to establish a status, is considered. In the first, it is said to avail nothing; in the second, to be good against property within the State whose courts render it, but not out of it; in the last, to determine the status or condition of the resident by dissolving the marriage tie, and therefore necessarily precludes the other party from asserting, or any court in any State from holding that the marriage so dissolved exists or is in force.

It follows, I think, that the true and safe rule is as stated by Cooley (Const. Lim. 400), that the actual *bona fide* residence of either husband or wife within a State will give to that State authority to determine the status of such party, and to pass upon any questions affecting his or her continuance in the marriage relation, and that the courts of that State, authorized by its legislature to take cognizance of the subject, may lawfully pass upon such questions and annul the marriage for any cause allowed by the local law, that jurisdiction over the opposite party may be acquired in such manner as the legislature

Dissenting opinion, per DANFORTH, J.

may direct, and whether by service in, or notice out of the State, or by publication, is sufficient to justify a decree changing the status of the complaining party, and thereby terminating the marriage. By holding otherwise we declare our own statutes (Code Civ. Proc., § 433, sub. 4; § 1774), upon the same subject unavailing, and compliance with them a useless and idle formality.

There is another proposition yet to be considered and answered in his favor before the plaintiff can succeed on this appeal. The *Baker Case* (*supra*), however much or little it may be regarded as differing in principle from the one before us, brought before the court a very different case, arising under a different statute. His conviction for bigamy was upheld because he contracted a marriage in this State in violation of the act concerning divorces, and for the purposes of that act, and proceedings for its violation, and the punishment of bigamy, it was evidently thought immaterial whether his first marriage was "in force" or not. Referring to the claim urged for the prisoner that our laws permitted such proceedings as were had against him in the Ohio court, the learned judge says: "This is but to say that on the principle of the comity of States, we should give effect to this judgment." "But," he continues, "this principle is not applied where the laws and judicial acts of another State are contrary to our own public policy, or to abstract justice, or pure morals. The policy of this State always has been that there may of right be but one sufficient cause for divorce *a vinculo*, and this policy has been upheld with strenuous efforts." The divorce then in question was not for that cause and it was not to be recognized. Under those laws a person whose guilty act has made divorce possible cannot marry a second time, if merely the former wife or husband is living. (2 R. S. 139, §§ 5, 6.)

Those are the words of prohibition, and to bring a party within them it is necessary only to show, first, a prior marriage, and second, that the parties thereto are living. "It does not import that the relation still continues, or, on the other hand, that it has ceased. Upon that point it is silent, but limits the

Dissenting opinion, per DANFORTH, J.

inquiry to the dry fact whether the person with whom the prior marriage was contracted still lives at the time of the subsequent marriage." (*Cropsey v. Ogden*, 11 N. Y. 233.) In that case in answer to the claim of counsel that the prohibition of the fifth section should be read as if it said "during the life-time of any *husband or wife* to whom the party was formerly married," the court declined to do so, saying "the meaning would be very much altered if we should yield to the request. So read, it would or might import that the relation of husband and wife must still continue between the former husband and wife, at the time of the subsequent marriage," adding "the word 'former' as used in the section in question" (§ 5), "imports that the relation of husband and wife once existed, but neither affirms its existence nor denies its termination. The prohibition then relates to the case of either party to a marriage, whenever and wherever contracted, both the parties to which are living, and prohibits either to contract a second or subsequent marriage during the life-time of the other, except in certain specified cases. This construction has recently been approved by us with great significance in overruling *Hovey's Case* (5 Barb. 117), where it was held by the Supreme Court that after the dissolution of a marriage for adultery, the marriage contract was at an end and the relation of husband and wife no longer existed between the parties, and if the guilty party marries again he is not within the penalty of the act against bigamy, but in *Faber's Case* (92 N. Y. 146) we held that for the purpose of enforcing the statutory prohibition, a person against whom a divorce had been obtained is regarded by the statute as having a husband or wife living so long as the party obtaining the divorce lives and that a conviction could be had, although the former marriage had been dissolved. Whether the former marriage was in force or not at the time of the offense was entirely immaterial. The statute (Code of Procedure, § 1742), brought before us by this appeal, permits no such construction. It adopts the language of the former statute, but adds a new term to it. "An action," it declares, "may be maintained to procure a judgment declaring a marriage contract void, and annulling the marriage,

Dissenting opinion, per DANFORTH, J.

if at the time of the marriage the former husband or wife of one of the parties was living, and the marriage with the former husband and wife was then in force." This last condition requires the interpretation which the court in *Cropsey v. Ogden* (*supra*) refused to give to the one first referred to.

One is satisfied with the fact of a former marriage and the present existence of the parties; the other requires as much, viz.: (1) A former marriage; (2) the present existence of the parties, and also (3) that the former marriage itself be then in force. Now in *Baker's Case* (*supra*) the court say (p. 84). "We must and do concede that a State may adjudge the status of its citizen toward a non-resident, and may authorize to that end such judicial proceeding as it sees fit, and that other States must acquiesce so long as the operation of the judgment is kept within its own borders." So is the whole argument of the learned judge. Hence he says: "If one party to a proceeding is domiciled in a State, the status of that party, as affected by the matrimonial relation, may be adjudged upon, and confirmed or changed in accordance with the laws of that State." The claim was indeed made that the State, where the other party was domiciled, might exercise over him or her the same jurisdiction and so apply the statute against bigamy. But that does not contain the governing words of the other. And even if within that opinion the courts of Ohio could not declare the status of the defendant in this State, it could and it did lift the marriage yoke from off the neck of its citizen, relieved him from the "*vinculum matrimonii*," and hence although the parties to the former marriage still lived, one of them was confessedly relieved from all his marital obligations and legally disabled from enforcing those of the other. She had no husband at least in the State where he lived. The contract was no longer binding on him. It follows that the former marriage cannot be said to have been in force at the time of the marriage which is the subject of this action.

When the statute speaks of a "marriage then" (at the time of the second marriage) "in force," it must mean a marriage by which both parties are bound and as to which the relation

Dissenting opinion, per DANFORTH, J.

of neither party has been changed. What is the allegation of the plaintiff here? That K., living in Ohio, is the husband of the defendant, and the marriage "in full force." Neither assertion is true. As to K., it must be conceded, under any aspect of the case, the marriage is dissolved, and under any view of the law, that he is discharged from the marriage bond. The judgment operates upon him in Ohio, attaches to, and determines his relation and character. In *Moore v. Hegeman* (92 N. Y. 521), commenting upon a similar statute of New Jersey, it was said to be very clear "that it had in contemplation a wife or husband who had not been divorced and who was invested with all the marital rights conferred by a lawful marriage." If I am wrong in supposing that the facts of this case are not enough to bring it within the proposition, on which the opinion in *Baker's Case* (*supra*) stands, then the defendant here might be found guilty of bigamy, because the policy of our law recognizes no divorce save for one cause, and that not the one alleged against her. But there is nothing in that decision which requires us to hold that the former marriage was in force when the second was solemnized. On the contrary, the necessary result of the opinion is that the Ohio decree was good as changing the status of the wife, but not effective in this State to protect her from the imputation of bigamy. If the status of the wife was changed, the marriage was not in force. And in view of these conflicting conditions, the learned judge recognizes the hardship of being "a husband in name, and under disabilities, or ties, in one jurisdiction, and single and marriageable in another." If the law is to be so rendered, and this defendant put in that position, it will still remain, that the plaintiff's case was not brought within the plain language of the statute. It certainly cannot be said that the former husband, as to whom, even under the doctrine of the *Baker Case*, the dissolution of marriage is absolute, can, in any degree, be held united to the defendant, by the tie which such a relation implies. I think the decree put an end to the contract. But if it had only a partial operation, the marriage cannot be said

Dissenting opinion, per DANFORTH, J.

to be in force; and that the statute requires as a condition of jurisdiction.

One other question remains: Was the evidence on which the referee put his decision competent? Public policy forbids that a marriage should be dissolved either by the mere consent of the parties thereto, or by a judicial proceeding which has no other foundation than their admissions. Were it otherwise, the morals of the community would be easily corrupted and the forms of law made effectual in the profanation of marriage. Therefore the Code, which has changed the common-law rule as to the competency of witnesses in civil actions, forbids husband or wife testifying, in an action for divorce on the ground of adultery, to any matter save their marriage. What cannot be done by their testimony should not be done indirectly by any act of theirs, neither by admission in pleading nor by stipulation of counsel. Here we find no evidence of the fact of the former marriage. The pleadings indeed concede it, and counsel have stipulated that it took place. Neither of these things can have any efficacy, except as they were authorized by the parties, and their admission or statement, however formally expressed, should have no effect when their testimony as witnesses is excluded. Neither will the law permit such a judgment by default, although in other actions the silence of the defendant is effectual as an admission in favor of the plaintiff. The fact pleaded and the fact stipulated is the vital one in the case, and to permit a divorce under such circumstances is practically to concede that a relation in the continuance of which the State has an interest, may be dissolved, as it was formed, by the simple agreement of the parties.

I have examined the cases, which, as cited by the appellant, seemed to bear upon this question, but find none which requires a different conclusion from the one expressed. In my opinion, therefore, the learned court below did not err under the circumstances of this case, in whatever aspect they may be viewed, in refusing to annul the marriage between the plaintiff and the defendant. They might well hold that the plaintiff's case was not proven, or if there was irregularity in

Statement of case.

the proceedings in the court of Ohio, waive it in a spirit of comity and accredit the judgment, rather than pronounce a relation which for nearly twenty years the parties treated as lawful, to have been adulterous. They might also hold that the judicial proceedings in Ohio were effective, and that the interest of society and justice to the parties required that respect should be given to them.

I think the order appealed from should be affirmed and the defendant have judgment absolute, dismissing the complaint.

RUGER, Ch. J., RAPALLO, ANDREWS and EARL, JJ., concur, for reversal; MILLER and FINCH, JJ., concur with DANFORTH, J., and dissent.

Order of General Term reversed and judgment of Special Term affirmed.

THE SCHENECTADY STOVE COMPANY, Respondent, v. CHARLES HOLBROOK et al., Appellants.

A contract for the sale of goods may not be predicated on an offer which was modified or withdrawn before an unconditional acceptance.

Under an offer of immediate sale, the buyer cannot extend the times of payment, by postponing the time of delivery, without the vendor's consent. On August 16, 1879, plaintiff in answer to a request from defendant's firm, gave by letter its prices for certain goods, with this statement, "this price only to hold good till thirtieth September." On September twenty-second defendants sent an order with directions, to have the goods ordered, put up and marked in a specified way, and sent in five or six shipments, at intervals of ten days or two weeks. In September, prior to the giving of the order, C., an agent of the plaintiff, had made to defendant, a proposition, modifying slightly the written offer; plaintiff on September twenty-fifth, wrote defendants, acknowledging receipt of order, giving their understanding of the terms, proposed by C.; on September twenty-ninth, ^{seventy} defendants sent another order, claiming, however, that the prices given by C. were less than as stated by plaintiff; plaintiff returned the order, with letter, stating it was beyond its power to accept. In an action to recover for the goods delivered under the first order, defendants set up as a counter-claim, damages for failure to fill the second order. *Held* untenable; that no contract was made for the sale of the goods specified in such order.

(Argued December 2, 1885; decided December 22, 1885.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 1, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover a balance alleged to be due for goods sold and delivered to defendants' firm. Defendants set up, as a counter-claim, damages for an alleged failure on the part of plaintiff to perform a contract for the sale and delivery of other goods.

On August 15, 1879, the firm of Holbrook, Merrill & Stetson, composed of defendants, wrote plaintiff, asking for "best prices on hollow-ware, delivered in New York." On August 16, 1879, plaintiff answered, inclosing catalogue, and offering the goods at a discount from catalogue prices as follows: "Sixty per cent, and ten per cent cash thirty days, but this price only to hold good till thirtieth September."

second In September following, one Clute, an agent of the plaintiff, called upon defendants, and made some modification in the prices. On September twenty-~~fifth~~, sent an order with directions to "make five or six shipments of above, to New York," the first one, soon as convenient, the others to follow ten days, or two weeks apart, also giving directions as to the manner of putting up, and marking the goods; on September twenty-fifth, plaintiff wrote to defendants as follows: "Our Mr. Clute has just returned and reported the conversation he had with you, in respect to your order of twenty-second instant, but he leaves us in doubt as to how it is to be invoiced, at sixty per cent and ten per cent cash, or sixty per cent and five per cent six months flat note." On September twenty-seventh, defendants sent another order to be put up and shipped the same as directed in reference to the first order, adding this statement: "The price Mr. Clute gave us was sixty-five per cent six months, or three and one-half per cent cash." On September twenty-ninth, plaintiff returned the order, writing as follows: "You must be mistaken in discount Mr. Clute gave you. He positively asserts it was sixty per cent, and five per cent six months' note. We cannot, therefore, ship any ware until you inform us whether

Statement of case.

we are to invoice at sixty per cent and ten per cent cash, or sixty per cent and five per cent six months' note. We return order of twenty-seventh, as it is beyond our power to accept it." Several other letters passed between the parties, each reiterating their views as to the offer made by Mr. Clute. On October third, defendants wrote: "You can invoice the ware as you choose, either at the cash price, or the six months' price." Plaintiff filled the first order, and the action was to recover a balance unpaid thereon.

Holbrook.
Jesse Johnson for appellants. A quotation of prices, to hold good for a specified time, and orders given thereon, within that time, reasonable in amount, and before the quotation is withdrawn, makes a contract binding on both parties. (*Howard v. Daly*, 61 N. Y. 362; *Pierson v. Morch*, 82 id. 503; *Trivor v. Wood*, 36 id. 307; *C. & Gt. E. R. R. Co. v. Dane*, 43 id. 240; *Martier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 11 N. Y. 441; *Myers v. Smith*, 48 Barb. 614.) The statement made by the letters of defendants that the order of the twenty-seventh exceeded plaintiff's capacity is not available here. (*Kellogg v. Norman*, 74 N. Y. 596.) The construction of contracts, resting on disconnected facts or papers, is ordinarily for the jury and not for the court. (*First Nat. Bank v. Dana*, 79 N. Y. 108; *Hawkins v. Pemberton*, 51 id. 202; *Jennings v. Sherwood*, 8 Com. 127; *Gardner v. Clark*, 17 Barb. 538; *Overton v. Tracy*, 14 S. & R. 330; *Watson v. Bland*, 12 id. 136; *Donaldson v. Richards*, 2 Harr. [Penn.] 205; 1 Greenl. on Ev. 275; *Duffee v. Mason*, 8 Cow. 25; *Payne v. T. & B. R. R. Co.*, 83 N. Y. 572; *Wolfkill v. Sixth Ave. R. R. Co.*, 38 id. 49.) It was not necessary for the plaintiff to offer proof of the interest due. That could have been computed by the jury or the counsel under the direction of the court. (*Huntington v. Conkey*, 33 Barb. 218.) The right to the affirmative upon an issue of fact is a legal right not resting in the discretion of the court. (*Willard v. Thorn*, 56 N. Y. 402; *Elwell v. Chamberlain*, 31 id. 611; *Hoxie v. Green*, 37 How. Pr. 97.)

Opinion of the Court, per RUGER, Ch. J.

Elihu Root for respondent. The letter of August 16, 1879, was merely a quotation of prices. It was not a proposition which, if accepted, would constitute a contract. (*Holtz v. Schmidt*, 59 N. Y. 253; *Moulton v. Kirshaw*, 59 Wis. 316.) Even if the letter of August sixteenth had contained all the elements essential to a proposition, the acceptance of which would constitute a contract, the transaction of September twenty-second, between the defendant and Mr. Clute, as shown in the correspondence, would have put an end to the proposition and excluded the possibility of its future acceptance. (*Frith v. Lawrence*, 1 Paige, 440.) That there was no evidence of any contract was matter for the determination of the court. (*Eaton v. Smith*, 20 Pick. 150; *Gibbs v. Society, etc.*, 38 Conn. 153; *Hutchinson v. Bower*, 5 M. & W. 535.) If there was a contract, the difference between the contract price and the market value of the goods on the thirtieth of September was the measure of damages. (*Masterdon v. Mayor, etc.*, 7 Hill, 62; *Parsons v. Sutton*, 66 N. Y. 92.)

RUGER, Ch. J. It is quite obvious that no contract was ever made between the parties with respect to the sale of the goods described in the order of September twenty-seventh. Their minds never met as to some of the elements necessary to constitute a valid contract. The catalogue of prices, containing a statement of terms of sale, delivered to defendants by plaintiff in August, contained no proposition, as to the amount of goods which the plaintiff was willing to sell, on the terms stated, and until an offer is made by one party, complete and definite in all material terms, it is not possible for another, to make a valid contract by the mere acceptance of a proposition. In other words, so long as there remains any of the material conditions of a contract to be settled and agreed upon, no binding agreement exists.

In both of the orders in question certain stipulations were imposed by the buyers, outside of terms and prices, which required an assent on the part of the vendor to make a valid executory contract of sale. Thus, the vendees required the goods to be put up in a particular manner, in bundles of uniform size,

with only a certain number of articles in each bundle, and that the goods should be shipped to New York in five or six shipments, with ten days or two weeks to intervene between each shipment.

Even if the prices and terms of credit had been agreed upon and understood, the vendor might well have declined to accept the order sent, upon the ground that the period for the delivery of the goods was extended beyond the limit set by them in giving price, viz., the thirtieth of September, or that their proposition, as to prices, related only to orders to be accompanied by immediate delivery, and payments to correspond with such time. Upon an offer of immediate sale at specified terms of credit, the buyer cannot extend the time of payment by postponing the time of delivery, without the vendor's consent.

But there is another objection to the alleged counter-claim. If the price list, delivered to the defendants by the plaintiff, could be regarded as containing a definite proposition to sell, which was open to the defendants to accept, previous to September thirtieth, and thus complete the execution of a contract, it was still, until accepted, a mere proposition, which it was competent for the plaintiff to withdraw at pleasure. The defendant did not, at any time prior to September thirtieth, order goods from plaintiff upon the terms stated in the plaintiff's price list. They claim that some time during the month of September one Clute, the agent of plaintiff, gave them other terms, and that they, therefore, had a right to order on the modified terms. Assume this to be so, and also that an unconditional order by the defendants of goods, according to the terms as modified by Clute, would make a valid contract, yet this would not render the order of the twenty-seventh good, for the reason that Clute's modification was practically withdrawn by the plaintiff before its acceptance by defendants. The plaintiff in the letter of the twenty-fifth of September assumes that, after Clute's modification, only two rates of discount were open to purchasers under the price list, and that defendants must conform to one or the other in making purchases. In reply to

this letter, defendants make the large order of September twenty-seventh, which is in dispute, and require that it shall be accepted upon the terms which they had previously understood Clute to offer.

Even if we assume that Clute did make the modification as claimed by defendants, yet they were informed on the twenty-fifth, that neither Clute nor the plaintiff supposed that he had made any such modification, and the only terms upon which they were willing to make sales were re-stated to the defendants. Notwithstanding this information and the implied disavowal of the Clute terms, the defendants still insisted that the order of the twenty-seventh should be accepted and filled according to their understanding of the prior order. Certainly no irrevocable offer was made by plaintiff, and no contract can be predicated upon an offer which has been modified or withdrawn before an unconditional acceptance. If at the time an acceptance is made there is a dispute going on between the parties as to the terms of the offer, can it be said that the minds of the parties have met when the acceptance of the disputed offer is tendered? We think not.

We have thus concluded that no contract for the sale of the goods mentioned in the order of September twenty-seventh was made by the receipt by the plaintiff of defendants' letter of that date; and it is equally clear that none was made afterward.

Upon the twenty-ninth the plaintiff informed the defendants that it was beyond their power to accept that order, and they have never varied from this position. They had the right to reject the order for the reason stated, whatever may have been the truth as to the controversy, relating to terms and prices; and after September thirtieth, no offer remained open for the defendants' acceptance. The order of September twenty-second was made good by the delivery and acceptance of the goods, the plaintiff having severed the orders by distinct and repeated refusals to fill the one of the twenty-seventh.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

HENRY STEERS, Respondent, v. THE CITY OF BROOKLYN, Appellant.

101	51
112	298
112	298

101	51
144	88

When soil has been wrongfully deposited by human hands in the ocean or other public waters, in front of the uplands, so that the water-line is carried further out, the same rule applies as when such a deposit has been gradually made by natural causes, *i. e.* the accretion becomes the property of the owner of the upland, and his title still extends to the water-line.

101	51
d154	88

Plaintiff owned a lot in the city of B., bounded easterly by the water-line of the East river, and southerly by the central line of J. street, which street terminated at said water-line. A wharf had been built in front of his lot, extending to the center of said street, which plaintiff maintained, receiving wharfage from all persons using the same. The city authorities built a pier at the end of the street, shutting off from the water that portion of plaintiff's wharf in front of his half of the street. In an action to recover damages, *held*, that the erection of the pier was a wrongful interference with plaintiff's rights, and rendered the city liable; that the pier was to be considered as an accretion, and so much of it as was in front of his half of the street became his; also, that plaintiff was entitled to recover, as damages, the wharfage received by the city from that portion of the pier in front of his land; that defendant, having wrongfully collected the wharfage, was not entitled to any allowance for expenses incurred in collecting the same, or for the cost of building the wrongful structure, or keeping it in repair.

101	51
158	298

(Argued December 8, 1885; decided December 22, 1885.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made at the February term, 1883, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to recover damages alleged to have been sustained by reason of the unlawful erection, by defendant, of a pier in front of plaintiff's premises in the city of Brooklyn, and also to compel defendant to surrender said pier to plaintiff, and account for wharfage received.

The court found in substance that plaintiff was the owner of certain premises in the city of Brooklyn bounded southerly by the middle line of J., or Java street, and westerly by the

Statement of case.

East river; that he and his predecessors in title built a bulk-head along the water-front extending across the end of the northerly half of said street, filled in back of it, making a wharf, in accordance with the act (Chap. 302, Laws of 1849), and collected wharfage from vessels using the same. That in 1873 defendant built a pier across the end of said street in front of plaintiff's wharf, thereby preventing him from collecting wharfage for the use of that portion of his wharf in front of his half of said street.

The further material facts are stated in the opinion.

John A. Taylor for appellant. At the time, 1873, when Java street was extended by the building of the pier, which is the evil complained of, the only right of plaintiff in the premises was a franchise easement to go upon a bulk-head theretofore constructed by his grantors, and collect wharfage, dockage, and cranage therefrom. (Const. of 1846, art. 1, § 9; *People, ex rel., v. Com'rs*, 54 N. Y. 276.) The fee below original high-water mark, which was far east of plaintiff's bulk-head, was, until divested by competent authority, in the people of the State of New York. (*Gould v. H. R. R. Co.*, 6 N. Y. 522; *Furnigan v. Meyer*, 10 id. 568; *People v. Tibbitts*, 19 id. 523; *People v. Canal Appraisers*, 33 id. 461.) As Java street originally terminated at the river, all the acts of either plaintiff or defendant which redeemed the land from the water worked *ipso facto* a lawful extension of that street from which the right of access by the people and municipal control over it could never be excluded save by legislative interference. (*People v. Lambier*, 5 Denio, 9; 2 Dill. on Mun. Corp. [3d ed.], § 634; Laws of 1873, chap. 863, p. 1300.) As Java street was a public street, the defendant had the right to extend it by solid filling to the bulk-head line, and by pier to the pier line as established at that point in the river. (*Backers v. Detroit*, 26 Alb. L. J. 349; *McMurray v. Mayor, etc.*, 54 Md. 103; *Barney v. Keokuk*, 94 U. S. 324; *Packet Co. v. Catlettsburg*, 105 id. 559; *Wood v. Hoeft*, 9 Hun, 182; 74 N. Y. 612; chap. 296, Laws of 1852, p. 439, § 6.) The permanent water-

Statement of case.

line designated on Exhibit "B" was the westerly boundary line of the seventeenth ward of the city of Brooklyn. (Laws of 1854, chap. 384, tit. 1, § 18, p. 835; Laws of 1873, chap. 863, tit. 1, § 18, p. 1294.) The conclusion of law, which finds that the plaintiff is entitled to the possession of the northerly half of said pier or wharf, and of all wharfage, dockage and cramage arising therefrom, is erroneous, since it awards to a private person possession of a public street or wharf in face of the control and custody of all such properties awarded by the charter to the city. (Laws of 1873, chap. 863, p. 1300.) The land within the street having been dedicated to the uses of the public, the plaintiff could recover at the most but nominal damages. (*Matter of City of Brooklyn*, 73 N. Y. 179.) The plaintiff could rightfully obtain only such judgment as is consistent with the case made by the complaint, and embraced within the issue. (Code of Civ. Pro., § 1207; *Stevens v. Mayor, etc.*, 84 N. Y. 296.) The plaintiff was not entitled to the injunction asked in his prayer for relief; it was neither alleged, proven nor found that the pier in question was a nuisance. (Code of Civ. Pro., § 1662.) The pier was not either as matter of fact or law a nuisance. (*D. & H. C. Co. v. Lawrence*, 2 Hun, 163.) The plaintiff's remedy was by an action for damages, or of ejectment, if he has title to the land upon which the pier stands. (*Taylor v. Brookman*, 45 Barb. 106; *C. & A. R. R. Co. v. Finch*, 5 Sandf. 48.) The obstruction of the bulk-head by the pier was permanent and complete. The cause of action accrued, therefore, as respects the entire damages suffered immediately upon the building of the pier in 1873, more than six years prior to the commencement of the action. (*Van Zandt v. Mayor, etc.*, 21 Sup. Ct. 375.) Plaintiff was not entitled to judgment as for moneys received to his use, because there is no proof that any moneys were received. (*Salter v. Hall*, 31 N. Y. 321.) The acts (Chap. 305, Laws of 1868, and chap. 513, Laws of 1880) do not give any additional rights to the plaintiff at the foot of or in Java street. (*People v. Lambier*, 5 Denio, 9; *Wetmore v. Atlantic Co.*, 37 Barb. 95.)

Statement of case.

James R. Steers, Jr., for respondents. The act of April 10, 1849, is constitutional and valid. It grants a franchise, and such grants do not appropriate public property to private uses. (*People v. Law*, 34 Barb. 494; *People v. Kerr*, 37 id. 357; 6 N. Y. 647; *Wetmore v. Atlantic W. L. Co.*, 37 Barb. 70; *Wetmore v. Brooklyn Gas L. Co.*, 42 N. Y. 384; Cooley on Const. Lim. 163; 16 Pick. 96.) The plaintiff is entitled to all the wharfage accruing from the wharves, bulk-heads and piers built in front of his lands. (*Pearsall v. Post*, 20 Wend. 131; *Verplanck v. Mayor, etc.*, 2 Edw. Ch. 220.) The conditions imposed on the owners of the land by the act of 1849 were in the nature of continuing offers, which, when accepted and complied with by them, became an executed contract, and the title and rights of the plaintiffs became vested and fixed. (*Langdon v. Mayor, etc.*, 93 N. Y. 129.) This right to receive wharfage is a franchise, and can only be exercised under a grant from the sovereign power or by prescription. (*Wiswall v. Wall*, 3 Paige's Ch. 318; *Walsh v. N. Y. Floating D. D. Co.*, 77 N. Y. 448; *People v. Utica Ins. Co.*, 15 Johns. 358.) The franchise thus obtained by the plaintiff is inviolable. (*Benson v. Mayor, etc.*, 10 Barb. 240.) Upon the facts herein established and upon the legal and equitable principles applicable thereto, the plaintiff is entitled to a decree of the court, requiring the defendant to remove the structure it has erected at the foot of Java street. (*Penniman v. Balance Dock Co.*, 13 How. Pr. 40.) Under the law of accretion the pier has become a part of the upland and bulk-head belonging to the plaintiff, and the title to it is now in the plaintiff subject to the right of way of the public over it as a street. (*Wetmore v. Atlantic W. L. Co.*, 37 Barb. 70; 42 N. Y. 384.) Although this action is an equitable one, the court may not only grant equitable remedies, but the legal rights of the owners of the land may therein be established. (*Broistedt v. S. S. R. R. Co.*, 55 N. Y. 220.) This action, being to enforce equitable rights, is not barred by the statute of limitations under ten years. (Code of Civ. Pro., § 388.) The power conferred on the city by its charter does not allow it, by mere extension of its streets, to deprive

Opinion of the Court, per EARL, J.

the owners of the upland and water-front of the enjoyment and improvement of their own premises. (*City of Brooklyn v. N. Y. Ferry Co.*, 87 N. Y. 204.) The title to the structure, having been found to be in plaintiff, the rights of possession and wharfage necessarily follow. (2 Johns. 363.) The seventh conclusion of law, that the defendant must account to the plaintiff for the wharfage it has collected, is simply the exercise of one of the well-established powers of a court of equity. (Code of Civ. Pro., § 1015; *Stanley v. White*, 14 East, 332; *Hager v. Hager*, 38 Barb. 92; 2 Denio, 91; *Tuttle v. Mayo*, 7 Johns. 132; Dough. 137.) Privity of contract is not essential. (1 Abb. Ct. App. Dec. 333; 29 Wis. 611; 111 Mass. 474; 30 Barb. 233; Code of Civ. Pro., §§ 1496, 1497; *Lisle v. Hunt*, 21 N. Y. Weekly Dig. 482.) The acts of the defendant, in intruding upon the franchise of the plaintiff, and in collecting the fees for wharfage, as they successively arose, were a continuing trespass in the nature of a nuisance, which might become the foundation of adverse rights, and the occasion of a multiplicity of suits to recover such fees. They were properly restrained by injunction. (6 Paige, 83; 16 N. Y. 97; 13 Hun, 285; 40 N. Y. 191; 55 id. 220.) An acknowledgment of having received the money, made by the defendant in any form, is binding upon it. (*Thalheimer v. Brinckerhoff*, 6 Cow. 90.) As the defendant could not sustain an action against the plaintiff upon its claim for a counter equity, the proof to support such claim was properly rejected. (*Canada v. Stiger*, 55 N. Y. 452; *Koestenbader v. Pierce*, 41 Iowa, 204; *Jebson v. E. & W. T. D. Co.*, L. R., 6 C. P. 300.) Even in ejectment a defendant cannot off-set his improvements, unless he entered upon the lands, and made his erections under color of title, which the defendant has not pretended to set up in this case. (Code of Civ. Pro., § 1531.) It was proper for the referee to take and state the accounts down to the time of the hearing. (*Darling v. Brewster*, 55 N. Y. 669.)

EARL, J. Under his paper title and the acts of the legislature (Chap. 302, Laws of 1849, chap. 305, Laws of 1868, and chap.

Opinion of the Court, per EARL, J.

518, Laws of 1880), there can be no doubt that the plaintiff was vested with the fee of the land to the center of Java street, and extending to the water-line of the East river and that he had a right to maintain his wharf in front of his land and his one-half of the street and take and receive wharfage from all persons using the same. His fee in the street, however, was subject to the public easement for travel over the street to the water-line, and is still so subject. When, therefore, the defendant built a pier at the end of Java street thus shutting off the plaintiff's wharf across one-half of the street from the water, it interfered with his rights and became liable to him for damages. That structure was a wrongful interference with the plaintiff's franchise, secured to him by the acts of the legislature referred to. The plaintiff was, therefore, entitled to the judgment which was ordered in his favor.

The court below was right in holding that the pier wrongfully built by the defendant across the end of Java street must be treated as an accretion to the upland or mainland, and thus so much of it as was in front of plaintiff's half of Java street and in front of his wharf became his (subject, however, to the public easement for travel upon Java street), as it was attached to his soil and was between his land and the water-line. When soil is by natural causes gradually deposited in the water opposite upland, and thus the water-line is carried further out into the ocean or other public water, it becomes attached to the upland, and, the title of the upland owner is still extended to the water-line, and the accretion thus becomes his property. Natural justice requires that such accretion should belong to the upland owner so that he will not be shut off from the water, and thus converted into an inland rather than a littoral owner. The same rule should be applied for the same reason where the soil in front of the upland has been wrongfully placed there by human hands. The wrong-doer should gain nothing by his wrong, and justice cannot be done to the upland owner except by awarding to him, as against the wrong-doer, the accretion attached to his soil as an extension thereof. (*Ledyard v. Ten Eyck*, 36 Barb. 102, 125; *Langdon v. Mayor, etc.*, 93

N. Y. 129; *Mulry v. Norton*, 100 id. 424; Gould on Waters, §§ 123, 124, 128, 148, 153; Angell on Tide Waters, 249.)

The interlocutory judgment ordered a reference to take an account between the parties for all wharfage received by the defendant from the northerly half of the pier or wharf, since the 21st day of December, 1875, and it was provided that if the defendant did not account for such wharfage it must pay the plaintiff a sum equal to the reasonable wharfage during the time mentioned. In pursuance of the judgment a referee was appointed, and upon the hearing before him the counsel for the defendant, upon being called upon by plaintiff to present an account of the wharfage received by it, stated that he had no such account to render. Plaintiff's counsel then offering to prove what was the reasonable wharfage, the counsel for the defendant, while objecting to the competency of the fact to bind the defendant, admitted that such reasonable wharfage during the period in question amounted to \$1,250, to-wit: at the rate of \$203.35 a year, and the referee ruling that such fact was competent, the defendant excepted. Counsel for the defendant further admitted, under the same objection, and also upon the ground of irrelevancy, that such reasonable wharfage from the twenty-first day of December to the date of the hearing was worth \$156, and the referee ruling such latter fact competent and relevant, the defendant excepted. Counsel for the defendant then offered to prove (1) that such wharfage was more than the plaintiff would or could have received from the bulk-head had not the pier in question been built; (2) the reasonable cost of building the pier in question; (3) the cost of the reasonable and necessary repairs thereto during the period in question; (4) the reasonable value or expense of collecting such wharfage. Counsel for the plaintiff objected to each of these facts as incompetent and irrelevant, and the objections were sustained and defendant excepted. These exceptions point out no error. It was substantially conceded that the defendant had received the wharfage from so much of the pier as was in front of the north-

Statement of case.

erly half of Java street, and while it could not or would not present any account of it, it admitted the amount of the reasonable wharfage during the period named. The money thus collected and received by it rightfully belonged to the plaintiff, and it was not proper to indulge in mere speculation whether the plaintiff would have collected so much from his bulk-head had the pier not been built, nor was it proper to prove the reasonable cost of building the wrongful structure, or of keeping it in repair, and the defendant having wrongfully collected the wharfage it could not be allowed any expense for collecting the same. Plaintiff had the right to collect his wharfage in his own way upon payment of such expenses as he should think proper to incur.

On the whole we think the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

101	58
127	491

101	58
135	502

JOHN W. SMITH, Appellant, v. THE BROOKLYN SAVINGS BANK,
Respondent.

Possession by a stranger of the pass-book of a depositor in a savings bank constitutes no evidence of a right to draw money thereon; to make payments to one having no other evidence of authority than possession of the book a protection to the bank, it is necessary for it to show some special contract with the depositor authorizing such a mode of payment. In a pass-book issued by defendant to a depositor was a printed by-law, a portion of which is as follows: "All payments made by the bank upon the presentation of the pass-book, and duly entered therein will be regarded as binding upon the depositor; money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass-book." *Held*, that the by-law contemplated but two modes of payment, one to the depositor personally, the other upon his written order, both requiring the presentation of the pass-book as the condition thereof; and that it did not authorize or protect the bank in a payment to a stranger whose only evidence of authority to receive it was the possession of the pass-book.

Schoenwald v. Metropolitan Bank (37 N. Y. 418), distinguished.

Statement of case.

Also held, that it was error for the trial court to exclude evidence tending to show want of care and prudence on the part of the bank in making such payments.

(Argued December 3, 1885 ; decided December 22, 1885.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made September 12, 1883, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial.

This action was brought to recover the amount of various deposits made by plaintiff in defendant's bank, and entered in a pass-book delivered to him.

The defense was that the moneys deposited had been paid out by the bank on presentation of the pass-book to a third person whom the proof showed was a brother of plaintiff, who had no authority from plaintiff to draw the money, and who had unlawfully possessed himself of the pass-book.

Further material facts are stated in the opinion

James Troy for appellant. Payment by a savings bank, to a person presenting a pass-book, is good, if the officer have no notice of fraud, and in making such payment, exercise reasonable care and diligence. (*Hayden v. Brooklyn Savings Bk.*, 15 Abb. [N. S.] 297; *Appleby v. Erie Co. S. Bk.*, 62 N. Y. 12; *Allen v. Williamsburgh S. Bk.*, 69 id. 317.) Under the by-laws in evidence, the defendant had no right to pay over the money to any person, other than the depositor, without an order in writing. (*Walsh v. German Am. Bk.*, 73 N. Y. 424; *Frank v. Chemical Bk.*, 37 N. Y. Super. Ct. [J. & S.] 26; 13 Weekly Dig. 374.)

Wm. S. Cogswell for respondent. In the absence of any rules assented to by its customers, a savings bank is to be governed by the same legal principles which apply to other moneyed institutions. When it has prescribed rules, and its depositor has assented to them, they are the agreement, and each party must keep it, to preserve his rights against the other. (*Allen v. Williamsburgh Sav. Bk.*, 69 N. Y. 321; *Boone v. Citizens' Sav. Bk.*,

Opinion of the Court, per RUGER, Ch. J.

84 id. 87.) The respondent had a right to make the payments on the presentation of the pass-book, unless there was some suspicious circumstance, that notified it that the person presenting it was not the depositor. (*Shoenwald v. Met. Sav. Bk.*, 57 N. Y. 418; *Boone v. Citizens' Sav. Bk.*, 84 id. 88.) In paying money upon the presentation of a deposit book, reasonable care and diligence do not necessarily require the disbursing officer of a savings bank to demand strict proof of the identity of a depositor. (56 Me. 507; 27 Conn. 229; 46 N. H. 78.) There is no proof of want of care in making the payments, and the burden to show this is on the appellant. (*Israel v. Bowery Sav. Bk.*, 9 Daly, 507.)

RUGER, Ch. J. The defendant, a savings bank, seeks to justify the payment by it of a depositor's money, to a stranger upon the ground that such payments were made to a person having possession of the depositor's pass-book. Such a pass-book is not negotiable paper, and its possession constitutes in itself no evidence of a right to draw money thereon. It merely imports a liability of the bank to the depositor for the moneys deposited, and an agreement to repay them at such time and in such manner as he shall direct. This contract is implied from the nature and objects of the transaction occurring between the parties. (*Crawford v. West Side Bank*, 100 N. Y. 51.) The depositor may by special contract authorize payments to be made in some other manner than by his directions, but, in order to make such payments a protection to the bank, it is necessary for it to show some special agreement with the customer, authorizing such a mode of payment.

The defendant in this case claims to have had such authority by force of a by-law printed in the pass-book, delivered to the plaintiff at the time of making his first deposit. Assuming, for the purpose of the argument, that the mere acceptance by the depositor of a pass-book containing by-laws regulating the manner of making deposits, and payments, constitutes a contract between the parties, we will inquire into the meaning and intent of the by-law referred to. It reads as follows: "All

deposits and drafts must be entered in the pass-book at the time of the transaction, and all payments made by the bank, upon the presentation of the pass-book, and duly entered therein, will be regarded as binding upon the depositor. Money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass-book. No money shall be received, nor shall any money be paid out except by the teller at the bank in the presence of an officer or trustee. No money shall be withdrawn as a matter of right without three months' previous notice." We do not think this by-law supports the contention of the defendant.

It is argued by it that the phrase "all payments," as used therein, means any sum of money, delivered by it, to any person who may for the time being, have in his possession the pass-book, and it is only by assuming that such a delivery of money, is a payment upon that account, that any color of support is afforded to the argument. This may have been the understanding and intention of the bank in framing the by-law, but in order to make that, understanding obligatory upon the customer, it was also necessary that he should have a similar understanding, or that the law should have been expressed in language incapable of any other fair construction. We do not think that the word "payments," as used in it, can, according to the legal or common acceptation or meaning of the word, be construed to mean any sums which the bank might choose to disburse, regardless of the person to whom they were made. Payment by a debtor can be legally made only to the creditor or his authorized representative, and in order to constitute any other transaction a payment, it is essential to its validity, that it should be authorized by the person entitled to demand it.

The defendants have not here shown any such authority. An agreement that payments made in a particular manner shall be binding and conclusive upon the depositor does not tend to authorize a payment made to a stranger, or give any other signification to the word "payment" than it usually bears. The effect which, it is argued, should be given to the language used can be indulged in only by force of a contract with the

depositor; but it is here attempted to imply the contract from the mere use of the word "payments," etc. This is reasoning in a circle, and proves nothing.

Further examination of the provisions of the law confirms our views. It is quite improbable that so important a power should have been left to be inferred from loose and doubtful phraseology, if it had been originally intended to be conferred by the parties, and the plaintiff is entitled in this case to that construction of the by-law which makes it conform to the popular and ordinary signification of its language.

The by-law seems to contemplate but two modes of payment, both of which require the presentation of the pass-book as the condition thereof, one apparently authorizing a payment to the depositor personally, and the other, one which may be made in his absence. The one provides for the conclusive effect of payments made, and duly entered in the pass-book, and the other, for payments made in his absence to a third person, having possession of the pass-book. This provision requires the depositor's written order to accompany the pass-book.

The fair implication from this provision is, that no other payments to strangers are contemplated or authorized. *Expressio unius est exclusio alterius*. Any other construction of the by-law would render the clause referred to unmeaning and inoperative. If the bank were authorized to make payments to a stranger, having possession of the pass-book alone, the provision authorizing the bank also to make such payments to a stranger, not only having possession of the pass-book, but also of the depositor's written order, would be useless and unmeaning.

It is the duty of a court to give effect to all of the provisions and language used in framing a law, if it is susceptible of such a construction, and they are precluded from giving it such an effect as will render any of its clauses inoperative or ineffectual. Such a construction as we have indicated is the only one which gives a legitimate operation to the clause referring to a written order.

This case is not affected by the decisions in *Schoenwald v.*

Statement of case.

Metropolitan Bank (57 N. Y. 418) and similar cases, where the language of the contract was substantially different. There the language of the by-law plainly implied and provided for payment, made to other persons than the depositor, and gave a signification to the word "payments" which included strangers having possession of the pass-book.

The conclusion reached by us, as to the authority conferred by this by-law upon the bank in making payments, renders it unnecessary to refer to the other questions in the case. It may not, however, be inappropriate to say that we are also of the opinion that, within the cases of *Boone v. Citizens' Savings Bank* (84 N. Y. 88) and *Allen v. Williamsburgh Savings Bank* (69 id. 321), the court below erred in refusing to submit the question to the jury as to whether, upon the evidence in the case, the defendant exercised reasonable care and prudence in making the alleged payments.

It follows of course from this, that the trial court also erred in excluding evidence tending to show the want of care and prudence on the part of the bank in disbursing the plaintiff's funds.

The judgments of the General and Trial Terms. should be reversed, and a new trial ordered, with costs to abide the result.

All concur.

Judgment reversed.

MAX HEUERTEMATTE et al., Appellants, v. FRANCIS MORRIS,
Respondent.

A *bona fide* holder for value of a bill of exchange before acceptance is not required to pay an additional consideration to the drawee for his acceptance, in order to enforce it against him.

The bill itself implies a representation by the drawer that the drawee is in funds to meet it, and the contract of the former is that the latter will accept and pay according to the terms of the bill; the subsequent acceptance constitutes an admission of the truth of the representation, which the drawee and acceptor is not thereafter allowed to retract.

Statement of case.

R. who resided at Rivas in the State of Nicaragua, having collected a claim as agent for plaintiffs who resided at Panama, sent to them a draft for the amount, less cost of collection and exchange, drawn by him on defendant at New York; this draft was received and accepted by plaintiffs in lieu of the moneys collected, and was remitted to New York; it was accepted by defendant, but when presented for payment it was refused. In an action upon the draft, *held*, that plaintiffs were *bona fide* holders for value; that the funds collected by R. remained their property, until by their acceptance of the draft they consented to and approved of that mode of transmission, and simultaneously with such acceptance the title to the funds passed to R.; that until such acceptance the conventional relation of debtor and creditor did not exist between R. and plaintiffs, and then those relations were governed by the liabilities existing by force of the draft alone; and that defendant was precluded by his acceptance from showing that it was without consideration and was induced by fraud on the part of the drawer

(Argued December 7, 1885; decided December 22, 1885.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made October 27, 1882, which reversed a judgment in favor of plaintiff, entered upon a verdict directed by the court. (Reported below, 28 Hun, 77.)

This action was brought upon defendant's acceptance of a bill of exchange drawn upon him at ninety days by Ran Runnels of Rivas, in the State of Nicaragua, payable to the order of Hourquet & Poylo and by them indorsed before acceptance to plaintiffs.

Defendant offered to show that the acceptance was made without consideration and was induced by fraudulent representations on the part of the drawer; this was objected to and excluded.

The material facts are stated in the opinion.

F. R. Coudert for appellants. An acceptance estops the acceptor from denying consideration or alleging fraud of drawer as against a *bona fide* holder. (*Harger v. Worrall*, 69 N. Y. 371; *Comstock v. Hier*, 73 id. 273; *Nickerson v. Ruger*, 76 id. 276; *First Nat. Bk. v. Green*, 43 id. 301.) Want of consideration between the drawer and acceptor is no defense against one who has given consideration for the bill, if that

Statement of case.

fact be not known to the holder before he gives value for it. (*U. S. v. Bk. of Metropolis*, 15 Pet. [U. S.] 377; *Corbett v. Clark*, 45 Wis. 403; *Wells v. Brigham*, 6 Cush. 6.) As against a *bona fide* holder, the acceptor must pay although the bill prove to be forged. (*Goddard v. Merchants' Bk.*, 4 Comst. 147; *Lather v. Simpson*, L. R., 11 Eq. 398; *Smith v. Braine*, 16 Ad. & Ell. [N. S.] 498; *Fitch v. Jones*, 5 Ell. & Bl. 238; *Anderson v. Warne*, 71 Ill. 20; *Roberts v. Lane*, 64 Mo. 108.) The acceptance is equally binding and subject to the same application of the rule of estoppel, whether given prior or subsequent to parting with value. (*Commercial Bk. v. Norton*, 1 Hill, 501; *Philbrick v. Dallett*, 2 J. & S. 370; *Nat'l Bk. v. Schuyler*, 7 id. 440; *Theidermann v. Goldschmidt*, 1 De Gex, F. & J. 4; *Robinson v. Reynolds*, 2 Q. B. 211; *Hoffman v. Bk. of Milwaukee*, 12 Wall. 181; *Voorhis v. Olmstead*, 66 N. Y. 113; *Nat'l Bk. v. Nat'l Bk. Comm.*, 50 id. 585.)

C. E. Coddington for respondent. Where a bill is void in its creation, or has been unduly obtained, or wrongfully diverted from its purpose and fraudulently negotiated, the party suing on it is bound to show himself a *bona fide* possessor. The affirmative is with the plaintiff, in an action upon such a bill, to prove a clear legal title, valid as against the parties to the instrument. (*Comstock v. Hier*, 73 N. Y. 273; *Nickerson v. Ruger*, 76 id. 279.) One who receives a bill or note before due, and without notice and knowledge of any fraud in its inception or transfer, but for a precedent debt, and without parting with value or any valuable consideration, does not acquire a valid title to the note or bill, but takes it subject to all its infirmities, precisely as if he had taken it after dishonor, or with knowledge of all the circumstances affecting its validity. (*Moore v. Ryder*, 65 N. Y. 441; *Lawrence v. Clark*, 36 id. 123.) The extinction of a legal demand, in its original form, is to be proved affirmatively; and the question whether a party is a holder for value of the new security, so as to displace, in his favor, any right or equity against the party to whom it was given, depends

Opinion of the Court, per RUGER, Ch. J.

upon the fact being established of an intended and actual extinguishment. (*N. Y. Exchange Co. v. De Wolf*, 3 Bosw. 86.) Plaintiffs were bound to prove an express agreement between them and Ran Runnels or Hourquet & Poylo, that the taking of the bill was an absolute payment and discharge of plaintiff's claim against them for the money they had collected. (*Farlington v. Frankfort Bk.*, 31 Barb. 183.) The receipt, alleged to have been given by plaintiffs to Ran Runnels, does not answer this requirement. (*Olcott v. Rathbone*, 5 Wend. 493; *Bradford v. Fox*, 38 N. Y. 289; *Phoenix Ins. Co. v. Church*, 81 id. 221; *Molden v. Whitlock*, 1 Cow. 290; *Lawrence v. Clark*, 36 N. Y. 131.) Defendant is not estopped by an acceptance, upon which plaintiffs did not rely when they took the bill, from showing as against them that the acceptance is void for fraud. (*Farmers & Mechanics' Bk. v. Empire Stone Dressing Co.*, 5 Bosw. 290.) The delivery of a check does not operate as payment of a debt, and a receipt given upon delivery of the check, acknowledging the receipt of money, adds nothing to the effect of such delivery. (*Bradford v. Fox*, 38 N. Y. 290; *Olcott v. Rathbone*, 5 Wend. 493; *Molden v. Whitlock*, 1 Cow. 290; *Lawrence v. Clark*, 36 N. Y. 101; *Moore v. Ryder*, 65 id. 441.) As plaintiffs knew that Hourquet & Poylo could not collect the claim any more directly than they could themselves, but would be compelled to employ an agent, they thus authorized the employment of an agent by Hourquet & Poylo. (*Dorchester Bk. v. New England Bk.*, 1 Cush. 177; *Story's Agency*, § 14, note 3.) Wherever any express or implied authority to appoint a sub-agent is allowed or given by the principal, a privity is created between them. (*Story's Agency*, §§ 201, 387.)

RUGER, Ch. J. In the discussion of this case it is unnecessary to consider particularly the agency of Hourquet & Poylo in the transaction, as they acted solely as the gratuitous agents of the plaintiffs, and had no interest in the subject of the business. It may, therefore, be treated as a transaction occurring directly between the plaintiffs and Ran Runnels, and concisely

described, was to the following effect: The plaintiffs were merchants doing business at Panama, and one Christofel was a customer and debtor of theirs, residing at San Juan del Sur, near Rivas, in the State of Nicaragua. Christofel was desirous of discharging his obligations to the plaintiffs, but was embarrassed in doing so by the infrequency of communication between Rivas and Panama, and the want of a system of exchange enabling him to transmit funds safely and expeditiously from one place to the other. Under these circumstances the plaintiffs consulted Hourquet & Poylo, a business firm at Panama, as to the best manner of collecting the debt. The plaintiffs were informed by Hourquet & Poylo that Ran Runnels was a correspondent of theirs residing at Rivas, and that the collection could probably be made through him, and offered to transmit a draft on Christofel to Runnels, for that purpose. Thereupon the plaintiffs made their draft on Christofel at sixty days for \$1,000 payable to Hourquet & Poylo, who indorsed the same to Runnels and forwarded it to him at Rivas for collection. In due time it was received by Runnels, and at its maturity was paid to him, in Columbian currency.

It becomes important now to determine the legal obligations and duties of the parties toward each other at this stage of the transaction. In the collection of the draft Runnels acted as the mere agent of the plaintiffs, and had no interest in the proceeds except, perhaps, a lien thereon for the value of his services in making the collection. He had no right or authority to use such funds for his individual purposes, and his sole duty in relation to them, was that of their transmission to his principals. The nature of the business impliedly authorized him, to make such transmission according to the usages of trade, and in the absence of such usages to do so by some other method which should, in the exercise of reasonable care and prudence, promise to accomplish the object intended. It was, therefore, open to him to transmit the funds received in specie as they were collected, or he could have purchased a bill of exchange, if opportunity served, at that place, and transmitted that; or he could remit them in any other way deemed most safe, convenient and

Opinion of the Court, per RUGER, Ch. J.

desirable to him, subject to the approval by his principals, of the method adopted. It does not appear in the case but that Runnels was a merchant or banker and accustomed to sell exchange upon foreign places. However that may be, he in fact sent to the plaintiffs, February 4, 1879, immediately upon collection, the proceeds thereof, less cost of collection and exchange, by the draft in suit. This was his own draft upon the defendant Morris, at New York, at ninety days' sight. Upon the receipt of this draft by the plaintiffs, it was accepted by them and remitted to New York, for presentation to, and acceptance by the drawee, and the same was accepted by him February 26, 1879.

The sole question in the case is whether the plaintiffs were *bona fide* holders for value of the draft. We cannot doubt but that they were. If on receiving the funds in question Runnels had purchased with them a bill of exchange or draft from a merchant, or banker, according to the usages of trade, and transmitted the same to the plaintiffs, no question could arise but that he acted as their agent in the transaction, and they would have been *bona fide* holders of such paper within all definitions of that character, and we are unable to see the difference in principle between such a case and the transaction in question. The funds collected by Runnels were, until they consented to their appropriation by him, at all times the property of the plaintiffs. Runnels' sole duty in relation to them was that of transmission to the plaintiffs, and until that duty was legally performed he held them in a fiduciary capacity for a specified purpose. His duty of transmission could not be performed by remitting his own obligation, payable at a future day, except by the consent and approval of the plaintiffs. Until this consent and approval was given the funds remained the property of the plaintiffs, and any use of them by Runnels before that time would have constituted a violation of his duty to his principals, which it cannot be presumed he committed.

Doubtless the lack of adequate facilities of exchange between Rio and Panama induced Runnels to offer, and the plaintiffs to accept, the mode of remittance adopted, and it was entirely

competent for Runnels to propose, and for the plaintiffs to accept such a solution of the inconveniences of the situation; but no title to the funds collected passed to Runnels, until the acceptance of the draft by the plaintiffs. After that and not till then he was authorized to use those funds as his own.

By the original employment the plaintiffs contemplated no credit to Runnels and he had no right to, and it does not appear that he even supposed, he acquired any right to use the funds in question for his own purposes, or that he ever did so use them. The conventional relation of debtor and creditor never existed between Runnels and the plaintiffs until the acceptance of his draft upon Morris, and then those relations were governed by the liabilities existing by force of the draft alone.

In accordance with the rule which precludes a court from presuming a violation of duty by an individual, we must assume that Runnels performed his duty, and his whole duty, to the plaintiffs as their agent. This required him to safely keep their funds until he had transmitted them according to the usage of trade, or in some other mode approved by them. The legal effect of the method adopted was to transfer the title to the funds collected, to Runnels simultaneously with the acceptance by the plaintiffs of Runnels' draft upon Morris, and was the precise equivalent of the payment of so much money in the immediate purchase of a draft or bill of exchange by one person from another. We are, therefore, of the opinion that the plaintiffs were the *bona fide* holders for value of the draft in suit and are entitled to recover thereon.

The General Term conceded that the plaintiffs were *bona fide* holders for value of the bill before acceptance, but deny them that character after acceptance as against the acceptor. We think the concession is fatal to the conclusion reached by that court.

It is said that the *Farmers & Mechanics' Bank v. Empire Stone Dressing Co.* (5 Bosw. 290) is authority for the position. It is true that some expressions of the learned judge writing in that case may justify the citation, yet it should be considered

Opinion of the Court, per RUGER, Ch. J.

that those remarks were unnecessary to the decision of the case, and the same court have twice since then refused to follow it.

We conceive the rule there laid down finds no support in the doctrines of the text-writers or the reported cases. (*Philbrick v. Dallett*, 2 J. & S. 370; *First Nat. Bank of Portland v. Schuyler*, 7 id. 440; Parsons on Bills and Notes, 323; Daniels on Neg. Inst., § 534; Edwards on Bills [2d ed.], 410.)

If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. (Parsons on Bills, 323, 544; *Arpin v. Chapin*, Mass. Sup. Ct., Oct., 1885.) The drawee can of course upon presentment refuse to accept a bill, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept a bill, he becomes primarily liable for its payment, not only to its indorsees but also to the drawer himself.

The delivery of a bill or check by one person to another for value implies a representation on the part of the drawer that the drawee is in funds for its payment, and the subsequent acceptance of such check or bill constitutes an admission of the truth of the representation, which the drawee is not allowed to retract. (Daniels on Neg. Inst. 534; Parsons on Bills, 323, 544, 545.) By such acceptance the drawee admits the truth of the representation, and having obtained a suspension of the holder's remedies against the drawer, and an extension of credit by his admission, is not afterward at liberty to controvert the fact as against a *bona fide* holder for value of the bill.

The payment to the drawer of the purchase-price furnishes a good consideration for the acceptance which he then undertakes shall be made, and its subsequent performance by the drawee is only the fulfillment of the contract which the drawer represents he is authorized by the drawee to make.

Statement of case.

The rule that it is not competent for an acceptor to allege as a defense to an action on a bill that it was done without consideration, or for accommodation, as against a *bona fide* holder for value of such paper, flows logically from the conclusive force given to his admission of funds, and is elementary. (Daniels on Neg. Inst., §§ 532-534; Edwards on Bills, 410; *Harger v. Worrall*, 69 N. Y. 371; *Com. Bk. of Lake Erie v. Norton*, 1 Hill, 501; *Robinson v. Reynolds*, 2 Q. B. 196, 211; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181.)

Of course the cases determined upon the ground that the payee of such paper received it to apply upon an antecedent debt, or that it had been unlawfully diverted from the purpose for which it was designed, have no application to the circumstances of this case.

The judgments of the courts below should, therefore, be reversed and a new trial ordered, with costs to abide the result.

All concur.

Judgment reversed.

CYRUS BUTLER, Respondent, v. JOHN SMALLEY et al., Appellants.

The penalty imposed by the General Manufacturing Act (§ 15, chap. 40, Laws of 1848) upon the trustees of a corporation organized under it for signing an annual report "false in any material representation" with knowledge of its falsity, is not incurred simply because of an omission from the aggregate of indebtedness of certain liabilities of the company, although this was known to the defendants at the time the report was made.

Where it appears that the report was made within the twenty days but not filed until thereafter the inquiry is as to whether the company is in default; while the law requires the filing to be within a reasonable time after the twenty days, and this exacts prompt performance and diligent action, if the company avails itself of the usual method of performing its duty, and the performance is within a reasonable time, having regard to the nature and circumstances thereof, in the absence of any thing showing want of good faith and active diligence, the trustees are not liable.

101	71
108	597
101	71
137	845
101	71
165	7

Statement of case.

A manufacturing corporation made and published its report within twenty days after the 1st day of January, 1878, but through a mistake of its secretary, to whom it was delivered for that purpose, it was not filed within that time. Upon application to the Supreme Court an order was granted February thirteenth that the report be filed *nunc pro tunc* and it was filed on that day. In an action by a creditor of the corporation against the trustees, *held*, that the order did not relieve the defendants from the consequence of any default on their part, as the duty to file the report was imposed by statute, and over it the court had no jurisdiction; but that the application was an act by defendants in furtherance of their duty, and an indication of good faith; and a finding that there was neither a prompt performance nor diligent action on the part of the company with respect to the filing was error; as was also a refusal to find that whether the report was filed within a reasonable time after the expiration of the twenty days depended upon the circumstances of the case.

(Submitted June 12, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 2, 1883, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the material facts are set forth in the opinion.

Thomas Winsor & Samuel Marsh for appellants. A filing of the report, if not within twenty days, is not a *sine qua non*. No action is given for mere non-filing of report. (*Cameron v. Seaman*, 69 N. Y. 402.) The provision as to filing is directory; while, in a proper case, gross negligence or wanton willfulness in not filing, would be visited with condign punishment. (*Veeder v. Mudgett*, 95 N. Y. 295, 298, 300, 315.) The order *nunc pro tunc*, ordering that the report "be filed in the office of the clerk of the county of New York, as of the 17th of January, 1878," is binding on the company, its officers, and the plaintiff as their managing stockholder, or corporator, and to all intents and purposes a trustee or director in control of the whole concern. (*Gildersleeve v. Dixon*, 6 Daly, 76.) The filing *nunc pro tunc*, February 13, 1878, as of January 17, 1878, was valid and binding on the company, even if it were not on an outside creditor, and especially was

Statement of case.

it binding on Butler, considering his confidential relations to the company; the chiefest stockholder and most active man on duty, and in all reality a trustee. (*Briggs v. Easterly*, 62 Barb. 51; *Bonnell v. Griswold*, 80 N. Y. 135; *Easterly v. Barber*, 65 id. 252; *Deming v. Puleston*, id. 655; *Pier v. Hanmore*, 86 id. 95; *Arthur v. Griswold*, 55 id. 400.)

Frank A. Irish for respondent. The defendants are liable for the debt in question, because they failed to file a report as provided in the twelfth section of the act of 1848, as soon as practicable after the expiration of twenty days from the first day of January, and because they failed in prompt performance and diligent action with respect to such filing. (*Gildersleeve v. Dixon*, 6 Daly, 76; *Deming v. Puleston*, 35 N. Y. Super. Ct. 309; *Vincent v. Sands*, 33 id. 511; *Jones v. Barlow*, 62 N. Y. 202; *Cameron v. Seaman*, 69 id. 396; *Bolen v. Crosby*, 49 id. 183; *Sanborn v. Lefferts*, 58 id. 179.) When the trustees had failed to file their annual report according to law the penalty attached, and the right of action in favor of plaintiff and other creditors accrued and was perfect. (*Matter of Empire City Bk.*, 18 N. Y. 199; *Taylor v. Porter*, 4 Hill, 140; *Rockwell v. Nearing*, 35 N. Y. 302; *Westervelt v. Gregg*, 12 id. 202; *Happy v. Mosher*, 43 id. 313.) Where there is a fixed or contemplated money obligation there is an existing debt within the statute; and although the right of action against the trustees in a case where the debt is payable in the future does not accrue until the maturity of the debt, yet the debt exists; and upon its maturity the trustees who neglected to conform to the statute while it was outstanding may be held under this section. (*Jones v. Barlow*, 62 N. Y. 202; *Vernon v. Palmer*, 43 N. Y. Super. Ct. 231; *Leggett v. Bank of Sing Sing*, 24 N. Y. 291.) The objection of misjoinder of causes of action is not available. It was not taken by demurrer or answer, and is therefore waived. (Code, §§ 498, 499.) In any case there was no misjoinder. (*Bonnell v. Wheeler*, 1 Hun, 332; *Bonnell v. Griswold*, 68 N. Y. 294; *Arthur v. Griswold*, 55 id. 400.)

Opinion of the Court, per DANFORTH, J.

DANFORTH, J. "The Lathrop Anti-Frictionate Company" was organized under the Manufacturing Law of 1848 (Chap. 40). It made and published a report of its affairs, as required by section 12 of that act, within twenty days after the 1st day of January, 1878, but the report was not filed until February thirteenth. The defendants were its trustees, and the plaintiff, claiming to be a creditor of the company, brought this action to fix a liability upon them for his debt, on the grounds, *first*, that the report was false in fact; and, *second*, was not filed within the said twenty days, "nor as soon as practicable thereafter." The first ground seems now to be abandoned by the counsel for the respondent, and indeed could not well be insisted upon. There is no finding that the report was false, nor that the defendants signed it knowing it to be false, but only that it omitted from the aggregate of indebtedness certain liabilities of the company, and that this was known to the defendants "at the time the report was made and filed;" nor is there any finding either of bad faith or of willful or fraudulent purpose on the part of the trustees, nor of any fact showing actual fraud; and without one or the other of these things, the penalty imposed for signing a report "false in any material representation" (§ 15, act of 1848, *supra*), is not incurred. (*Pier v. Hanmore*, 86 N. Y. 95; *Bonnell v. Griswold*, 89 id. 122.) The other point is disposed of by the construction given to section 12 (*supra*), in *Cameron v. Seaman* (69 N. Y. 396). In that case the precise question was whether the report must be filed and published, as well as made within the twenty days from the first of January, in order to meet the exigency of this section, and it was held that the limitation of twenty days, applied only to the act of making, and did not apply to the act of filing or publishing; that as to those acts, the section was directory, but as the object of the act was to insure a speedy and public disclosure of the contents of the report, it was said that the law, in the absence of an express provision on the subject, implies that both filing and publication should be within a reasonable time after the twenty days, and that this requirement exacted prompt performance and diligent action on the

Opinion of the Court, per DANFORTH, J.

part of the trustees. This rule was laid down as most consistent with reason and a due regard to convenience and justice, and leads to an inquiry in any given case, whether the party on whom the duty is imposed is shown to be in default. In that case the report was made within the twenty days, sent by mail to the county clerk and to the newspaper office on the twenty-first day and was in fact both filed and published, but of course not until after the expiration of the twenty days.

Now in the case before us it is conceded that the report was made within the twenty days, viz.: on the seventeenth of January. It was conclusively proven that at the moment of making, the report was delivered to the secretary for filing and publication; he caused its publication the next day, and the plaintiff himself proved that it was owing to the mistake of the secretary that it was not then filed. At the outset of the case the plaintiff introduced and put in evidence the annual report of the company, dated January 17, 1878, and a petition dated February eighth, addressed to the Supreme Court, and its order thereon. The report was in form sufficient, and the petition, verified by the secretary, stated that the report was published on the eighteenth of January, but, "by mistake, was not filed in the office of the clerk of the county of New York." The prayer of the petition was granted, and the court on the thirteenth day of February, ordered the report filed as of January seventeenth. In the course of the trial, the defendant, John Smalley, had testified that the report was filed in the clerk's office, January, 1878, and upon cross-examination the plaintiff's counsel called his attention to that evidence, saying, "and that you still affirm? is that so? Ans. That is so in one respect;" and being further pressed, said: "That report was made out and given to my son" (meaning the secretary), "and I supposed he took it there." This answer was, on motion of the examining counsel, stricken out, but subsequently on the same examination, the question was repeated, the plaintiff's counsel saying: "Q. I now repeat my former question. Did you swear on your direct examination as follows: 'Q. Do you know whether there was any report of the Lathrop Anti-Frictionate Co. filed in 1878, in Jan-

Opinion of the Court, per DANFORTH, J.

uary of that year? A. Yes, sir, there was.' A. I did. Q. You did not file it yourself? A. No, sir. Q. Don't you know that your son, William W. Smalley, subsequently, and as late as February eighth, made an application to the court upon a petition, in which he swore that through some mistake or other that report had not been filed within the first twenty days of the year, as required by law? A. I think I did. Q. Why did you swear as you did, that the report was filed in January, when you knew that your son had made a petition under oath that it was not? A. As far as I was concerned it was filed. I did every thing in my power; I had helped him to make out a report and he took it, and I was not aware at the time but what it was filed."

William Smalley, referred to by the foregoing witness, testified that he was secretary of the company; that the report was filed in 1878, and published. He testified to the preparation of a petition to the Supreme Court for leave to file the report, and the granting of the order on the thirteenth of February, that the report be then filed *nunc pro tunc*, as of the 18th of January, 1878.

The referee committed no error in refusing to hold that the order relieved the defendant. Such entries are sometimes made in the progress of litigation, upon the principle that a delay of the court shall prejudice no one. Here the duty to file the report was imposed by statute upon the corporation, and over it the court had no jurisdiction. But the application was an act by the defendants in supposed furtherance of their duty and was an indication of good faith in respect to the proper disposition of the report. It was an effort to do that which the corporation had not done. Under another act, similar in its purpose (Laws of 1875, chap. 611, § 18), a director may escape the consequences of an omission on the part of the company, by himself subsequently and within a fixed time filing a certificate or report, but no such provision is to be found in the act before us. It is enough, however, as we have seen (*Cameron v. Seaman, supra*), that it be filed within a reasonable time after the expiration of the twenty days, and the referee was asked

Statement of case.

to find that whether this was done would depend upon the circumstances of the case. This he refused to do, and the defendants excepted. In this the referee erred; and also in finding that there was neither prompt performance, nor diligent action on the part of the company with respect to the filing of the report. To prepare a report for filing and publication, to place it in good faith in the hands of the secretary for deposit in the clerk's office and in the office of a newspaper, is at least equal in significance to a delivery of a report to a mail agent for transmission to those places. In the one case as in the other the company avails itself of the usual method of performing its duty, and in the absence of any thing to show the want of good faith and active diligence in respect thereto on its part, a trustee, when no time is fixed by statute within which an act shall be performed, should not be subjected to a penalty, provided the thing required is actually done at a reasonable time, having regard to the nature and circumstances of the performance. The case at bar is not within the mischief at which the act is aimed, as it concededly is not within its terms. The referee erred in refusing to find as requested, and he found without evidence the existence of a default upon which the defendant might be charged.

We think the judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

All concur, except RUGER, Ch. J., and RAPPALO, J., not voting.

Judgment reversed.

ROBERT C. MARTIN, Appellant, v. JACOB S. RECTOR, Respondent.

Since the passage of the acts in relation to the property of married women there is no presumption that the husband is in occupation of his wife's lands, and in an action of ejectment brought against the husband to recover possession of such lands, whether she was occupying them at the

101	77
110	542
101	77
131	213

101	77
151	496

Statement of case.

time of the commencement of the action, or had given to her husband the possession, is to be determined as a question of fact.

(Argued October 6, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 1, 1883, which affirmed a judgment in favor of the defendant entered upon a verdict. (Reported below, 30 Hun, 138.)

This was an action of ejectment for non-payment of rent, under leases executed by Stephen Van Rensselaer.

Plaintiff claimed as grantee of the lessor. The interests of the original lessees were shown to have been transferred by successive conveyances to Martinus Lansing, who was father of defendant's wife. Non-payment of rent falling due in 1859, was shown. The action was commenced in 1860. It was proved in substance that in 1856 said Lansing told defendant's wife that, if she would move on the land in question, he would make her a present of it, and that she might go on and build and improve it, and he would give to her a deed. That defendant and his wife thereupon moved upon the premises, and lived thereon as husband and wife. Buildings were put up and improvements made.

The further facts, so far as material are stated in the opinion.

Esek Cowen for appellant. The defendant was, upon the undisputed facts of the case, an actual occupant of the premises within the meaning of the statute. (2 R. S. 304, § 4; *Shaver v. McGraw*, 12 Wend. 558; *Doe v. Sterling*, 2 Stark. 187; *Hamilton v. Douglas*, 46 N. Y. 218; *Alexander v. Ward*, 64 id. 230; *Townsend Bk. v. Todd*, 49 Conn. 231.) A mere equitable ownership in the wife, if that made any difference with the occupancy, did not exist here; the defendant went into possession by mere verbal permission of the wife's father. (*Freeman v. Freeman*, 43 N. Y. 35; *Lobdell v. Lobdell*, 33 How. 347.) The fact that the defendant occupied and possessed, as the representative of the wife, does confer upon him the occupancy within the statute. Even a servant in occupation

may be defendant in ejectment. (*Doe v. Stradling*, 2 Stark. 187.)

George W. Miller for respondent. Since 1848 a wife could hold, possess and occupy real property as a *feme sole*. (*Knapp v. Smith*, 27 N. Y. 277.) She could do so and could buy on credit without any other separate estate, and she could manage a farm by and through the agency and services of her husband, and hold the property and its increase as her separate estate. (*Ván Derwert v. Gould*, 36 N. Y. 639; *Abbey v. Deyo*, 44 id. 343; *Rowe v. Smith*, 45 id. 230.) Recent legislation has wholly changed the common law. The husband has no longer any right to the use of the real estate, or to the possession of the property thus acquired. (*Prevot v. Lawrence*, 51 N. Y. 219; *Wright v. Wright*, 54 id. 437; *Minier v. Minier*, 4 Lans. 422; *Wood v. Wood*, 18 Hun, 350; 83 N. Y. 575; *Alexander v. Hard*, 64 id. 228.) Payment of taxes by the husband shows no right or possession in him and is not even evidence of actual occupation. (*Minier v. Minier*, 4 Lans. 422; *Ludlow v. Meyers*, 3 Johns. 388.) A parol gift of land, followed by delivery of possession, continued occupancy and the making of substantial improvements, creates a good title. (*Freeman v. Freeman*, 43 N. Y. 34; *Lobdell v. Lobdell*, 36 id. 327.) The validity of Mrs. Rector's title was not in question. That she claimed title and was in possession — was the occupant — was sufficient to defeat the action against the defendant. (*Chamberlain v. Choles*, 35 N. Y. 447; *Steele v. Johnson*, 4 Allen, 425.)

DANFORTH, J. That the plaintiff was the grantee of the original lessor, that rent was due from the lessee, and unpaid, and that the demise contained a condition for re-entry upon the land in question for non-payment of rent was conceded, but the land was occupied and no recovery could be had unless the defendant was at the beginning of the action the actual occupant of the premises. (2 R. S. 304, § 4.) Whether he was such occupant was the question litigated at the trial. The

plaintiff claimed that the evidence was all one way, and of such force as to require the trial court to withhold it from the jury and direct a verdict for him. The judge declined to do so, and upon submission to the jury, their verdict was in favor of the defendant, as was also a special finding that "he was not the actual occupant of the premises at the time of the commencement of this action."

We think the learned court did not err. By force of the statutes relating to the property of married women (Laws of 1849, chap. 375), the wife may take the equitable or legal title to real and personal property, and hold the same to her sole and separate use as though she were unmarried. She might, therefore, cultivate the land and manage the personal property either in person or by means of any agency which any other owner of property might employ. (*Knapp v. Smith*, 27 N. Y. 277; *Draper v. Stouvenel*, 35 id. 507; *Rowe v. Smith*, 45 id. 230; *Bodine v. Killeen*, 53 id. 93; *Wood v. Wood*, 83 id. 575.) Whether she was doing so in this case or whether she had given to the defendant, her husband, the possession of the premises was the real subject of contention, and to be determined as a question of fact. (*Alexander v. Hard*, 64 N. Y. 228.) That the title was in her was unquestioned, without her consent he could have no legal possession, and therefore could not have even that rightful temporary use of the soil without which one could not be, in the language of the statute, an "actual occupant." In behalf of the plaintiff, the defendant at one time testified on examination before trial, but after suit brought, that he was in possession at the time of the commencement of the action, and with that general testimony the plaintiff rested. But afterward the facts constituting the possession and occupancy of the premises were disclosed, and it appearing that the land was given to Mrs. Rector by her father, the defendant testified: "My wife went upon those premises in pursuance of that. I went there with my wife; the property was given to her, and of course I went there and lived with her; that was the only reason I went there; I occupied the premises in no other way than that." "She continued," he says, "to live

Opinion of the Court, per DANFORTH, J.

upon and occupy these premises" for many years, and until a short time before the trial, and whatever he did "was by her directions," or as he says, "he was the acting man under his wife." She testifies that she went into possession at the time the farm was given to her, long before the commencement of the action, and continued in possession from that time, personally residing upon and occupying it; that she never gave the possession of the premises in any way to her husband. Upon this testimony the jury might well find that the defendant was not the "actual occupant." He was there as husband, servant, agent, not as one having, in relation to the land, any right or interest or power of control. In neither capacity did he occupy within the meaning of the statute. Nor were they in possession jointly. The possession was always her possession. If ousted by her husband or other person, she could bring an action to recover possession. Before the statutes (*supra*) the husband, *jure mariti*, had a right to the possession of his wife's lands, and as her head or master he might be presumed to be in occupation. It is now different. The wife as well as the husband may own lands free from the other's control, and there can be no such presumption. He may still be the head of the family without being in any legal sense the possessor or actual occupant of the house or land in or upon which the family reside.

But upon the whole evidence it was properly left for the jury to say whether the defendant was the actual occupant, and their verdict, rendered, as it was, under proper instructions, is conclusive.

We, therefore, agree with the General Term and think the judgment appealed from should be affirmed.

ANDREWS, MILLER and FINCH, JJ., concur; RAPALLO and EARL, JJ., dissent; RUGER, Ch. J., not voting.

Judgment affirmed.

Statement of case.

THE PEOPLE, ex rel. THE BOARD OF SUPERVISORS OF THE
COUNTY OF ULSTER, Respondent, v. THE COMMON COUNCIL
OF THE CITY OF KINGSTON, Appellant.

Under the statutes regulating appeals to the State assessors from equalizations made by boards of supervisors, of the valuation of property in their respective counties (Chap. 312, Laws of 1859; chap. 327, Laws of 1873; chap. 351, Laws of 1874; chap. 49, Laws of 1876; chap. 80, Laws of 1880), where such an appeal is dismissed, the costs and expenses incurred by the board may be charged against the town, city or ward appealing.

Under said acts the employment of necessary appraisers and searchers by the board at a reasonable *per diem* compensation, and the necessary disbursements in preparing for the investigation are legal items of expenses chargeable under the statute; and the decision of the board of supervisors—the auditing board created by the acts—as to the amount and reasonableness of the expenses incurred, in the absence of fraud or collusion, is final and conclusive.

It was within the power of the legislature to constitute the board of supervisors a board to audit the expenses chargeable upon the party appealing. In making the audit the members of the board simply discharge a duty of public administration, cast upon them by law, and are neither within the letter nor the spirit of the statute prohibiting a judge from sitting in a case in which he is a party or is interested.

At a meeting of the board of supervisors of the county of U. bills of expenses, duly verified, incurred by it in equalization proceedings, were presented. The supervisors and counsel of the city of K., the party appealing, had notice as early as November thirteenth of the amount of expenses claimed to have been incurred by the board. On November twenty-first, the board, then in session, appointed a committee to examine the bills and report thereon. On December first the counsel for the city notified the committee that the city desired to be heard. On December third, the committee made a report to the board, and upon its being read, the supervisors of the city requested that consideration thereof be postponed until the next day in order to give them time to examine the bills and present objections; the board, however, proceeded to act upon the report and made the audit, no specific objections being made by the city supervisors to any of the items; it was the practice of the board to adjourn on the fifth. In proceedings by *mandamus* to compel the common council of the city to levy and collect the sum audited, *held*, that under the circumstances disclosed, no legal right of the city was invaded by the denial of the application for delay.

Also *held*, that the board of supervisors had such an interest in enforcing the collection of the costs that it could authorize the proceedings; that

101	82
114	336

101	82
158	874

101	82
157	409

Statement of case.

the expenses, when incurred, were, in the first instance, on its credit, and so were county charges, it simply having a remedy over against the city in case the latter failed on its appeal.

The board passed a resolution on December fourth, authorizing the employment of counsel named, "in all matters in litigation" growing out of the equalization, and authorizing him "to take all necessary and proper proceedings in the name of the board;" subsequently a committee of its members was appointed with full power to do all things necessary in the litigation. *Held*, that ample authority was thus conferred to institute the proceedings.

The charter of the city provides a special system for the collection of taxes therein. It was objected that the charge against the city could not be enforced. *Held* untenable; that the direction in the act of 1873 (Chap. 327, Laws of 1873), requiring the sum audited by the board of supervisors to be "levied upon the taxable property in said * * * city," is to be carried out by causing the same to be levied in the usual way provided for levying and collecting taxes in the city.

The city procured a writ of *certiorari* to review the proceedings of the board in auditing the accounts and assessing them upon the city. The writ was dismissed by the General Term. *Held*, that its order was not *res adjudicata* as to the validity of the assessment, as the allowance or refusal of the writ was in the discretion of the court; and that the character of the order as a discretionary one was not altered by the fact that it appears in the opinion of the court that it examined the proceedings and considered them regular.

(Argued October 20, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made May 22, 1885, which affirmed an order of Special Term, granting a peremptory writ of *mandamus* herein.

The proceedings were instituted December 6, 1884, the Special Term order directed the issuance of a writ of *mandamus* commanding the common council of the city of Kingston to levy and collect upon the taxable property of the city the sum of \$18,308.07, audited by the board of supervisors December 3, 1883, for costs and expenses incurred by the board on an appeal to the State assessors, taken by the supervisors of the city of Kingston, November 28, 1882, from the equalization of the valuation of the real and personal property of the several towns and wards in the county of Ulster, made by the

Statement of case.

board of supervisors at its annual session in that year. The appeal came on to be heard before the State assessors, and was dismissed November 16, 1883.

The board of supervisors on the 29th of November, 1882, after said appeal was taken, appointed a committee to take charge of the interests of the board on the appeal, with power to employ counsel, and such clerical and other assistance as the committee should deem necessary, and take such measures and incur such expenses as their counsel might advise, or as they should deem meet and proper in the premises. Pursuant to this authority counsel were employed, and upon their advice the committee caused abstracts to be made of all conveyances recorded in the clerk's office of Ulster county, for the period of five years, commencing January 1, 1873, stating the consideration named in each case. The expense of obtaining these abstracts exceeded \$2,000. The committee also, by advice of their counsel, caused an appraisal to be made of each parcel of land, of which there was a several ownership in the county of Ulster, by appraisers appointed by them for each town and ward in the county (there being sixty-three appraisers in all), at an expense of \$9,570.03. Other expenses were incurred for clerical and other work, stenographers' fees, house hire, printing, etc., including the sum of \$1,227.84, for special services of persons who at the time were members of the board of supervisors. The aggregate expenses, including therein \$4,500 for services of counsel, as audited by the board of supervisors December 3, 1883, after the decision of the State assessors, amounted to the sum of \$21,446.99. The town of Marbletown also appealed from the equalization of 1882, which appeal was taken at the same time, as the appeal by the city of Kingston, and the two appeals were carried along concurrently, and were heard together by the State assessors, with the same result in each case. The board of supervisors, upon auditing the costs and expenses as above stated, apportioned them as between the town of Marbletown and the city of Kingston, upon the basis of the total equalized valuation of the town and city respectively — the sum of \$18,337.18, be-

Statement of case.

ing apportioned as the share of the city of Kingston, and the sum of \$3,109.81, as the share of Marbletown. Prior to the decision of the State assessors, the board of supervisors and the city of Kingston respectively submitted to the assessors a statement in detail of the expenses incurred by each. The statement of the board of supervisors corresponded in the aggregate with the sum as audited December 3, 1883, to-wit, \$21,446.99, and the expenses incurred by the city, as presented to the assessors, amounted to about the sum of \$18,800. Prior to the audit, and on the 21st of November, 1883, the board of supervisors (being then in session) appointed a committee to examine the bills of expenses incurred by the board on the appeals in the equalization proceedings, and to report. The bills prior to that time had been duly verified by the several claimants, and presented to the State assessors, and had been certified as correct by the committee originally appointed to act in behalf of the board, and it appears by uncontradicted evidence that the supervisors of Kingston and the counsel for the city, as early as on the 13th of November, 1883, were informed of the amount of expenses claimed to have been incurred by the board of supervisors. On the 1st of December, 1883, the counsel for the city notified the committee appointed November 21, 1883, that the city desired to be heard upon the matter of the audit, and to give testimony in respect to the bills presented. On the 3d of December, 1883, the committee reported to the board, and on the report being read, the supervisors of Kingston requested the board to postpone the consideration until the next day, in order to give them time to examine the bills and make such objections as they might desire. The board, however, proceeded to act upon the report, and made the audit as before stated. No specific objections were made by the supervisors of Kingston to any of the items. It appears that it was the practice of the board of supervisors at its annual session to adjourn from the fifth of December to the fifteenth, to enable the clerk to prepare the tax warrants for delivery to the proper officers. The return of the board of supervisors in the *certiorari* proceedings hereafter referred to and which is in evidence in

Statement of case.

the case, states that the application for delay was regarded as not having been made in good faith, but to prevent the auditing of the bills at that session of the board. On the 7th of December, 1883, the city of Kingston procured a writ of *certiorari* to be issued to review the proceedings of the board of supervisors upon the matter in question. The affidavits used on the application for the writ show that the supervisors of Kingston at that time had full knowledge of the contents of the bills. The board of supervisors made return to the *certiorari* and it was dismissed by the Supreme Court, May 31, 1884. An appeal was taken by the city to the Court of Appeals, and that court having intimated on the argument that the order in the form in which it was made was not appealable, permitted the appeal to be withdrawn, with a view to an application to the court below for an amendment of the order, which application, however, on being made, was denied. Subsequently, and on December 4, 1884, the prior litigation having been ended, the board of supervisors, by resolution, directed that so much of the sum of \$21,446.99 originally audited, as was audited to persons who were supervisors, viz., \$1,246.09, be levied and assessed on the county outside of Marbletown and Kingston, and that of the balance of said amount, \$17,271.77, with interest, making in all \$18,308.07, "be raised, levied and assessed" upon the taxable property of the city of Kingston, and paid to the treasurer of the county. This sum was on the 5th of December, 1884, included in the schedule of amounts to be raised for State and county expenses by the city of Kingston and delivered by the board of supervisors to the defendant on the same day. The common council directed the raising of the amounts of the other items in the schedule, but omitted to take any action in respect to this item. The *mandamus* proceedings were commenced December 6, 1885. It is claimed that they were instituted without the authority of the board of supervisors.

John J. Linson for appellant. The final order complained of is appealable to this court. (Code of Civ. Pro., § 190, subd.

Statement of case.

3; *People v. Common Council*, 78 N. Y. 56.) The questions raised by the defendant as to the power of the board of supervisors to make the alleged audit on which the proceeding is based, in the manner and under the circumstances in which this audit was made, are reviewable in this proceeding. (*People v. Supervisors*, 73 N. Y. 173; *People v. Lawrence*, 6 Hill, 244; *Hodges v. Buffalo*, 2 Denio, 110; *Holstead v. Mayor*, 3 N. Y. 430; *People v. Stout*, 23 Barb. 349.) There is nothing in the proceedings by *certiorari* to constitute an adjudication as to the validity of the relator's claim. (*People v. Stilwell*, 19 N. Y. 531; *People v. Hill*, 53 id. 547; *People v. Bd. Com'rs*, 77 id. 605; *People v. Bd. Com'rs*, 82 id. 506.) The audit of the board of supervisors was void because of their refusal of a hearing. (*In re Murphy*, 24 Hun, 592; *People v. Town Auditors*, 82 N. Y. 80; *People v. Supervisors*, 45 id. 196; *People v. Supervisors*, 30 How. Pr. 173; *People v. Supervisors*, 21 id. 322; *Chase v. Saratoga Co.*, 33 Barb. 603; Bouv. L. Dict., tit. "Audit;" Comyn's Dig., tit. "Account," 7, 8; *Stuart v. Palmer*, 74 N. Y. 183.) If the statute assumes to give the board of supervisors power to audit or tax their own costs and expenses it is unconstitutional and void. (Cooley on Const. Lim. 175, 410; *Lanfear v. Mayor*, 4 La. 87; 23 Am. Dec. 477; *W. Ins. Co. v. Price*, 1 Hopk. Ch. 1; *Dimes v. Prop'rs Gd. Junct. Canal*, 3 H. of L. Cas. 759; *Hall v. Thayer*, 105 Mass. 219; *Peck v. Essex*, 20 N. J. 457; *Dively v. Cedar Falls*, 21 Iowa, 565; *In re New Boston*, 49 N. H. 328.) The terms "costs" and "expenses" are practically synonymous, meaning only such disbursements as are recognized by law and the rules and practice of the courts. (2 Coke's Inst. 112; Stat. of Marl., chap. 6; id. 288; 6 Viner's Abr. 321; 2 Bacon's Abr. 33; 3 Comyn's Dig. 230; *Downing v. Marshall*, 37 N. Y. 380; *Onondaga v. Briggs*, 3 Denio, 174; *Hovey v. Hovey*, 5 Paige, 551; *Doe v. Green*, 2 id. 347; *Rogers v. Rogers*, id. 458; *N. Y. L. Ins. & T. Co. v. Davis*, 10 id. 507; *Lampman v. Hand*, 4 id. 120; *Denniston v. Vischer*, 5 id. 61; *Adams v. Stevens*, Clark's Ch. 536; *Whittimore v. Whittimore*, 7 Paige, 38; *Mark v. Buffalo*, 87 N. Y. 189; *Rothery v. N. Y. Rubber Co.*, 24

Statement of case.

Hun, 172; *Provost v. Farrell*, 13 id. 303; *Simer v. Mayor, etc.*, 3 Law Bull. 51; *Haynes v. Mosher*, 15 How. 216; *Case v. Price*, 17 id. 351; *Havel v. Cockcroft*, 9 Bosw. 479; *Perry v. Griffin*, 7 How. 263; *Arnoux v. Phelan*, 21 id. 88; *Gilman v. Oliver*, 14 Abb. Pr. 174.) It was error for the board of supervisors to audit and allow bills presented by its own members for committee work and other services connected with the litigation. (*Bd. of Sup'rs v. Van Clief*, 1 Hun, 554; *People v. Lawrence*, 6 Hill, 244; *Halstead v. Mayor*, 3 N. Y. 430; *People v. Stoudt*, 23 Barb. 349; *Chemung Bk. v. Sup'rs*, 5 Denio, 517.) The order appealed from should be reversed because the board of supervisors of the county of Ulster never authorized nor directed this proceeding to be brought. (Subd. 1, § 1, art. 1, tit. 1, chap. 12, part 1, R. S.; 2 R. S. [7th ed.] 924; subd. 4, § 4, art. 1, tit. 2, id., 2 R. S. [7th ed.] 926; § 5, id.; Cooley on Const. Lim. 204; Dill. on Mun. Corp., § 60; *Bd. of Excise v. Sackrider*, 35 N. Y. 154; *Thompson v. Schermerhorn*, 6 id. 92; *Lyon v. Jerome*, 26 Wend. 485; *Bellinger v. Gray*, 51 N. Y. 610; *Davis v. Read*, 65 id. 566; *Powell v. Tuttle*, 3 id. 396; *People v. Mut. U. Tel. Co.*, 2 McCarty's Civ. Pro. 295; *Ruggles v. Collier*, 43 Mo. 359; *St. Louis v. Clemens*, id. 395; *Hydes v. Joyes*, 4 Bush, 464; *State v. Jersey City*, 1 Dutch. [N. J.] 309; *S. C.*, 2 id. 444; *State v. Paterson*, 34 N. J. Law, 163; *White v. Mayor*, 2 Swan, 364; *Smith v. Morse*, 2 Cal. 524; *Oakland v. Carpentier*, 13 id. 549; *Day v. Green*, 4 Cush. 433; *Coffin v. Nantucket*, 11 id. 433; *Clark v. Washington*, 12 Wheat. 40; *Ry. Co. v. Baltimore*, 21 Md. 93; *McInery v. Reed*, 23 Iowa, 410; *State v. Fisk*, 9 R. I. 94.) The order should be reversed, because it is an attempt to have the courts legalize an unlawful act of the relators, and compel an unlawful act of the defendants. (§ 2, art. 1, tit. 1, chap. 12, part 1, R. S.; 2 R. S. [7th ed.] 924; *People v. Lawrence*, 6 Hill, 244; *Chemung Bk. v. Sup'rs*, 5 Denio, 517; *Sup'rs Richmond v. Ellis*, 57 N. Y. 620.) The grant of power to a municipal corporation to tax must be plainly and unmistakably conferred and strictly pursued. (*U. S. v. Mayor, etc.*, 2 Am. L. Reg. [N. S.] 394;

Statement of case.

Dill. on Mun. Corp., § 605; *Sharp v. Spier*, 4 Hill, 76; *Burnett v. Buffalo*, 17 N. Y. 383; *Howell v. Buffalo*, 15 id. 512; *Beatty v. Knowles*, 4 Pet. 152.) The board of supervisors of the county of Ulster has no interest in this proceeding nor in the relief demanded, hence it has no standing as a relator. (*St. Joseph v. Rogers*, 16 Wall. 644; *Police Jury v. Britton*, 15 id. 566; *Parker v. Loomis*, 6 Hill, 463; *Wilson v. Shreveport*, 29 La. Ann. 673; *Gause v. Clarksville*, 5 Dill. 165; *Brady v. Sup'rs*, 2 Sandf. 460; 6 N. Y. 260.) The order is in conflict with the well settled principle that *mandamus* will only lie where there is no other legal remedy. If the city is liable, the owners of claims can maintain an action against it upon them. (*Buck v. City of Lockport*, 43 How. Pr. 361; *People, ex rel. Guidet, v. Green*, 66 Barb. 630; *Mursh v. Little Valley*, 64 N. Y. 112.)

Alton B. Parker for respondent. The audit of the board of supervisors having been reviewed in a direct proceeding by *certiorari*, it is now *res adjudicata* and cannot be considered collateral proceeding. (Laws 1873, chap. 327; Laws 1874, chap. 351; Laws 1880, chap. 80; *Mercein v. People*, 25 Wend. 64; Tidd's Pr. 1051, 1138; Caines, 182; 20 Johns. 80; *Matter of Price*, 12 Hun, 508.) The judgment of a court or body of competent jurisdiction cannot be questioned in a collateral action or proceeding. (*De Renner v. Cautillion*, 4 Johns. Ch. 85; *Shallenkirk v. Wheeler*, 3 Johns. 275; *Hadley v. Mayor*, 33 N. Y. 603; *Morewood v. Corporation of N. Y.*, 6 How. 386.) Matters once directly decided by a court of competent jurisdiction shall not again be questioned while that decision remains in force, except by a court having powers to review such decision, and in the proper proceeding for that purpose. (*Broadhead v. McConnell*, 3 Barb. 175; *Gardner v. Buckbee*, 3 Cow. 120; *Wood v. Jackson*, 8 Wend. 1; *Lawrence v. Hunt*, 10 id. 80; *People v. Collins*, 19 id. 56; *Mercein v. People*, 25 id. 64; *People v. Bennett*, 13 Abb. 8.) The judgment or decree of a court possessing competent jurisdiction is not only final as to the subject-matter thereby determined, but also as to

Statement of case.

every other matter which the parties might litigate in the cause and which they might have decided. (*Masten v. Olcott*, 60 How. 105; *Malloney v. Horan*, 49 N. Y. 116; 1 Johns. Cas. [Shephard's ed.] 492, note; *Le Guen v. Gouverneur*, 1 Johns. Ch. 436.) The judgment and audit standing unreversed is *res adjudicata* as between the parties and conclusive upon them. (*Cooper v. Platt*, 13 J. & S. 242; *Blair v. Bartlett*, 75 N. Y. 150; *Kelsey v. Murray*, 49 Barb. 231; *Matter of Roberts*, 8 Daly, 95; *Brown v. Landon*, 30 Hun, 57.) It was the duty of the board of supervisors to defend their act and decision in the making of the equalization appealed from. (2 R. S. [7th ed.] 996; Laws of 1859, chap. 312; Laws 1880, chap. 269; 1 R. S. 364, § 4; *Brady v. Sup'rs*, 2 Sandf. 460; *People v. Sup'rs*, 85 N. Y. 328; chap. 327, Laws of 1873.) It was the duty or office of the board of supervisors to contest the appeals; it was their duty to incur the necessary expense to defend, and as between the board and its employes the expense becomes a county charge. (R. S. [Edm. ed.] 357, 358, § 3, subd. 15; *Bright v. Sup'rs*, 18 Johns. 242; *People v. Sup'rs*, 12 Wend. 257; *Doubleday v. Sup'rs*, 2 Cow. 533; *Brady v. Sup'rs*, 2 Sandf. 460; *People v. Sup'rs*, 45 N. Y. 196; *Bright v. Sup'rs*, 18 Johns. 242.) The board of supervisors had the power to employ persons to render such service as they deemed necessary to have rendered and performed for the benefit of the county in the preparation for trial and the hearing, and its contracts made therein are binding upon the county. (R. S. [7th ed.] 924, chap. 12, tit. 1, art. 1; *People v. Sup'rs*, 45 N. Y. 194.) The appeals not being sustained, the statute made it the duty of the board of supervisors to audit the costs and expenses arising therefrom and connected therewith. (Chap. 327, Laws 1873; chap. 351, Laws 1874; chap. 80, Laws 1880; chap. 327, Laws 1883; *Matter of Murphy*, 24 Hun, 594; *People v. Sup'rs*, 30 How. 173; *Chase v. Saratoga Co.*, 33 Barb. 603.) Their act in examining and allowing accounts chargeable to the county is a judicial act, and the decision is binding upon all parties concerned. (*People v. Stocking*, 50 Barb. 573; *Chase v. Saratoga Co.*, 33

Opinion of the Court, per ANDREWS, J.

id. 603; *Sup'rs v. Briggs*, 2 Denio, 26; *People v. Sup'rs*, 1 Hill, 195; *Brown v. Greene*, 46 How. 302; *People v. Greene*, 47 id. 382; *Baldwin v. Sup'rs*, 12 id. 204; *People v. Sup'rs*, 58 Barb. 145; *People v. Sup'rs*, 21 How. 322; *S. C.*, 24 id. 119; *People v. Green*, 56 N. Y. 466; *Huff v. Knapp*, 5 id. 67; *Brady v. Sup'rs*, 10 id. 260; *People v. Lawrence*, 6 Hill, 244; *Sup'rs v. Briggs*, 2 Denio, 26; *Martin v. Sup'rs*, 29 N. Y. 647; *Sup'rs v. Ellis*, 39 id. 626; *Nat. Bk. v. City of Elmira*, 53 id. 53; *People v. Stephens*, 75 id. 527; *In re Tinley*, 90 id. 231.) The judgment of a court of competent jurisdiction cannot be questioned in a collateral action or proceeding. (*De Riemer v. Cautillion*, 4 Johns. Ch. 85; *Hadley v. Mayor, etc.*, 33 N. Y. 603; *Morewood v. Corporation of N. Y.*, 6 How. 336.) The audit and levy having been made by the officers designated by statute for that purpose and in the manner directed by statute, the court will enforce collection. (Potter's Dwaris on Stat. and Const., 123; chap. 80, Laws of 1880, § 15; 2 Dill. on Mun. Corp. 758; *People v. Common Council*, 22 Barb. 404.) The proceeding by *mandamus* is the proper and only remedy. (2 Dill. on Mun. Corp. 757; *People v. Sup'rs*, 10 Wend. 363; *People v. Common Council*, 22 Barb. 404.) The board of supervisors is the proper party relator. (Chap. 12, tit. 1, art. 1, p. 924, R. S. [7th ed.]; *People v. Halsey*, 37 N. Y. 347.) The counsel for the respondent had authority to appear for the board of supervisors on the application for *mandamus*. (R. S. [7th ed.] 924; 3 Hun, 407; *Downing v. Ruger*, 21 Wend. 178; *Commissioners of Excise v. Suckrider*, 35 N. Y. 154.)

ANDREWS, J. The order made by the General Term on the return to the writ of *certiorari*, was not *res adjudicata* as to the validity of the assessment. It did not affirm or reverse the proceedings, but dismissed the writ. The allowance or refusal of a common-law *certiorari*, rests in the sound discretion of the court. The dismissal of the writ was an exercise of this discretion, and the character of the order, as a discretionary

Opinion of the Court, per ANDREWS, J.

one, is not altered by the fact that the court, in its opinion, examined the proceedings and considered them regular. (*People v. Stilwell*, 19 N. Y. 531; *People v. Hill*, 53 id. 547; *People v. Board of Commissioners, etc.*, 82 id. 506.) It is claimed in behalf of the city of Kingston, that the statute regulating appeals to the State assessors, from the equalization of the board of supervisors, does not on the appeal being dismissed, authorize the charging against the town, city, or ward appealing the costs and expenses incurred by the board of supervisors in defending the appeal. This depends upon the construction of the statutes regulating this proceeding. The right of appeal from an equalization made by a board of supervisors, was first given by chapter 312 of the Laws of 1859. Under that act an appeal was authorized to be taken by the supervisors of any town, city, or ward, to the State comptroller, who was authorized to determine what deduction, if any, ought to be made from the valuation fixed by the board of supervisors, of the property of the town, city, or ward (§ 13). No provision was made in this act for costs to either party. The act of 1859 was first amended by chapter 327 of the Laws of 1873. This act added a section to the original act as follows: "§ 15. Whenever an appeal shall not be sustained, the costs and expenses arising therefrom and connected therewith, shall be a charge upon the town, city, or ward so appealing, which shall be audited by the board of supervisors, and levied upon the taxable property in said town, city, or ward." This provision remained unchanged up to the time of the audit in question. It will be observed that the act of 1873 made no provision for costs and expenses, in case the appeal is sustained. This was first provided for by chapter 351 of the Laws of 1874, which added a clause to section 15, making it the duty of the comptroller, in case the appeal is sustained, to certify the reasonable costs and expenses of the appellant, and providing that the amount so certified should be audited by the board of supervisors and collected from the towns and cities in the county, other than the appellant. The act, chapter 80 of the Laws of 1880, further amended section 15, by substituting

the State assessors as the certifying body in place of the comptroller, and also providing that in the appeal is sustained the costs and expenses of both appellant and respondent should be audited and collected from the towns and cities other than the appellant. This was the condition of the legislation on the subject of costs and expenses on appeals in equalization proceedings, in 1883, when the audit in question was made.

The precise contention of the city of Kingston, as we understand it, is, that the provision in the act of 1873 was not intended, in case the appeal was not sustained, to charge the costs and expenses incurred by the board of supervisors against the appealing town, city, or ward, but was intended simply to protect and indemnify the supervisor by whom the appeal was brought, against the costs and expenses incurred by him in behalf of his town, and to put it out of the power of the town authorities to repudiate the claim, and saddle upon the supervisor the burden of the costs and expenses of the litigation. This construction has no support in the language of the act of 1873, and still less in the legislation which followed it. The acts of 1874 and 1880 expressly give costs to the appellant as against the county in case the appeal is sustained, and it is quite difficult to suggest any reason for exempting the town, ward, or city from a corresponding liability where the appeal fails. The construction of the act of 1873 contended for by the appellant is strained and unnatural, and moreover, if the intention of the legislature was, as is claimed, to protect the supervisor as against the town, the act failed to afford complete protection, because it makes no provision for costs and expenses incurred by the supervisor in a case where the appeal is successful. We think the act of 1873 authorized the costs and expenses incurred by the board of supervisors on the appeal to the State assessors to be charged upon the city of Kingston. The costs and expenses in this case audited by the board and charged upon the city embraced compensation to counsel, appraisers, and employes, and disbursements amounting in the aggregate to more than \$17,000. It is asserted that many of the items audited were not such as would be taxed in favor of

Opinion of the Court, per ANDREWS, J.

the prevailing party in an ordinary action. It is not claimed that any of the expenses audited were not incurred, or that they were incurred in bad faith. It certainly must be conceded that the preparation on the part of the board of supervisors to meet the issue presented by the appeal was very thorough. It, however, may well be doubted whether it was discreet or just to impose upon the city of Kingston and the town of Marbletown the entire expense of searching for and making abstracts of all the conveyances recorded in Ulster county for a period of five years, and of appraising every separate piece of real estate in the county. It may be assumed that few appeals will be taken to the State assessors from equalizations at the hazard of paying such enormous expenses. The mass of evidence collected by the supervisors will doubtless be very useful in future equalizations, but the equity of charging the whole cost of the information upon the appellant in this case is not very apparent. But we have to deal only with the question in its strictly legal aspects. The act (Chap. 49 of the Laws of 1876), amending the act of 1859 contemplates that evidence of valuation of real and personal property in the county shall be given, and it appears, without contradiction, that such evidence has usually been produced, and received by the State assessors. The statute of 1873 is very broad. All costs and expenses of the appeal "arising from or connected therewith" are chargeable. It constitutes the board of supervisors the auditing tribunal. What particular items shall constitute the costs and expenses mentioned are not defined. It cannot be said that the employment of necessary appraisers and searchers at a reasonable *per diem* compensation, and making the necessary disbursements in preparing for the investigation, were not legal items of expense chargeable under the statute. The determination as to their allowance the statute relegates to the board of supervisors, and the decision of the auditing board as to the amount, necessity, and reasonableness of the expense incurred, in the absence of fraud or collusion, is final and conclusive. (*Osterhoudt v. Rigney*, 98 N. Y. 222.)

It is further objected that the legislature could not constitute

the board of supervisors a board to audit the expenses chargeable against the city — the other party to the appeal — on the ground that thereby it was made a judge in its own cause. The authorities are decisive against the objection. The board of supervisors collectively had no interest to be affected by the audit, and its members as individuals had no interest other than was common to every tax payer in the county. In making the audit they were discharging a duty of public administration cast upon them by law, and were neither within the letter nor spirit of the statute prohibiting a judge from sitting in a case in which he is a party or is interested. (*People v. Wheeler*, 21 N. Y. 82; *FOLGER, J., Matter of Ryers*, 72 id. 15; *Foot v. Stiles*, 57 id. 399.) It is also objected that the board of supervisors denied a hearing to the supervisors of Kingston and their counsel prior to the audit. The supervisors of the city were members of the board. The board, in its aggregate capacity in exercising the powers conferred by statute, represented not only the whole county, but each town and ward therein affected by its proceedings. The return to the *certiorari*, shows that the demand for a hearing was not made until shortly before the time fixed for the adjournment of the board, and that in fact the supervisors of Kingston had knowledge of the bills presented for audit for some time before the demand was made, and so far as appears might have interposed any objections thereto. We think, under the circumstances disclosed, no legal right of the defendant was invaded by the denial of the application for delay. The inclusion in the original audit of allowances to persons who were supervisors, for special services rendered, amounting in the aggregate to \$1,227, is not now in question. This sum is excluded from the amount sought to be charged against Kingston, and its inclusion in the original audit, if erroneous, in the final result inflicted no injury upon the appellant. The point is also taken that the proceeding by *mandamus*, now under review, was never directed or authorized by the board of supervisors of Ulster county, and that for this reason the order maintaining the writ should be reversed. We enter-

Opinion of the Court, per ANDREWS, J.

tain no doubt that the board of supervisors had such an interest in enforcing the collection of the costs audited by the board, and charged against the city of Kingston, that it could authorize any proper proceeding to be taken in its behalf, to that end. It was the party respondent in the appeal. It was its duty, as the representative of the county, to defend its equalization, if it believed it to be just, and as incident to the duty it could incur the necessary expenses in defending its action. The county incurred them, and was in the first instance liable for their payment. The expenses, when incurred, were we think county charges. The statute enumerates as among county charges (1 R. S. 385, § 3, subd. 15), "the contingent expenses necessarily incurred for the use and benefit of a county." It has been frequently held that services rendered to a county in pursuance of a legal employment, for which no specific compensation is provided, are contingent charges against the county. (*Bright v. Supervisors, etc.*, 18 Johns. 242; *People v. Supervisors, etc.*, 12 Wend. 257; *People v. Supervisors of Delaware*, 45 N. Y. 196.) It is true that the act of 1873 declares that if the appeal is not sustained, the costs and expenses "shall be a charge on the town, city," etc. But it cannot be known until the decision of the State assessors, whether any costs or expenses will be chargeable against the party appealing. The board of supervisors must of necessity incur the expenses in the first instance on its own credit, and having done so, it has a remedy over against the town, city, or ward, in case it succeeds on the appeal. The board of supervisors, therefore, had an interest to enforce the collection of the charge against the city of Kingston. The precise point is that it did not authorize its attorney to pursue the remedy by *mandamus*, or take other legal proceeding to enforce its right. We think the resolution of December 4, 1883, for the employment of counsel, "in all matters in litigation," growing out of the equalization appeal, and authorizing him "to take all necessary and proper proceedings in the name of the board, in the actions and proceedings referred to," supplemented by the appointment of a committee December

Opinion of the Court, per ANDREWS, J.

12, 1883, with full power to do all things in the litigation, and incur such expenses therein as they might deem necessary in behalf of the board, conferred ample authority upon the counsel and committee to prosecute this proceeding. The criticism upon the resolution of December 4, 1863, is, that it only refers to matters "in litigation," and not to future litigation. This is quite too technical in view of the fact that no litigation was then pending, and the resolution would be without meaning unless it referred to the general controversy, and to litigations which might grow out of it.

The final objection is that the charge against the city of Kingston for the costs and expenses of the equalization appeal cannot be enforced through the ordinary statutory machinery for the collection of taxes in the city. The charter of Kingston provides a special system for the collection of taxes therein. The board of supervisors do not issue any warrant for the collection of the State or county tax chargeable upon the city. Section 72 of the charter requires the board to fix the proportionable amount of State and county charges to be paid by the city, a certificate of which is to be delivered by the clerk of the board to the clerk of the city, and it is then made the duty of the common council to raise the amount by tax, upon the warrant of the city clerk. (§ 73.) The board of supervisors in December, 1884, included in the schedule of taxes to be raised by the city its share of the expense of the equalization litigation. This we think was proper. The expenses were, as has been stated, in the first instance a county charge, but ultimately, as the event determined, to be paid by the city. The common council provided for the collection of the other items in the schedule, but omitted to take any action to levy the item in question. The *mandamus* proceeding was then instituted. It is now said that there was no refusal to collect this item. The omission to perform a plain duty is equivalent to a refusal, and one of the affidavits presented by the defendant in the *mandamus* proceeding sets forth the reasons "why the defendant will not raise the money," etc. We think the direction in the act of 1873, that the costs and expenses shall be audited by

Statement of case.

the board of supervisors and "levied upon the taxable property in said town, city, or ward," is to be carried out by causing the same to be levied in the usual way provided for levying and collecting taxes in the city.

The order should be affirmed.

All concur.

Order affirmed.

SARAH J. ULINE, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

To authorize the construction of a railroad upon or over a highway, where individuals own private rights or interests therein, or in the soil thereof, not only must the public right or license be obtained, but the individual rights and interests must be lawfully acquired; and if constructed without such acquisition, the builders are trespassers and are liable for all the damages sustained by the owners of such rights and property, as to whom the railroad is a continuing nuisance.

Where, however, the railroad is built, with proper care and skill, after the public rights and the private property, if any, in the highway, or the soil thereof, have been acquired, it is not a nuisance, and the owners of the railroad are not responsible for any damages to private property, adjacent or near to the road, necessarily resulting from its construction or operation.

Fletcher v. A. & S. R. R. Co. (25 Wend. 462), so far as it holds a contrary doctrine, stated to have been overruled.

Where, therefore, a railroad corporation, having acquired all private rights in a city street, and authority from the municipality, raised the grade of the street in front of defendant's adjoining lots so as to conform the grade of the street to the grade of the railroad crossing it, exercising proper care and prudence in doing the work, *held*, in the absence of any allegation or proof that the street as such was in any way injured for travel, or its usefulness unnecessarily impaired, defendant was not liable for the consequential damages to plaintiff's lots; that as the city could have raised the grade of the street without liability to abutting owners, it could authorize the defendant to do so without such liability.

Where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action, and it seems for any damages thereafter sustained; other actions may be brought successively until the nuisance shall be abated. The structure being a nuisance the railroad company is under legal obligation to remove it, and it

Statement of case.

is not to be presumed that it will continue it permanently. Damages, therefore, may not be awarded upon that assumption, nor will the judgment operate as a purchase of the right to have the structure remain. Accordingly held, that proof and an allowance as damage for the permanent diminution in the market value of plaintiff's lots was improper, conceding that the embankment was unlawfully constructed.

Henderson v. N. Y. C. R. R. Co. (78 N. Y. 423), distinguished; *City of North Vernon v. Voegler* (2 N. E. Rep. 831), distinguished and questioned.

It seems that where a railroad is unlawfully constructed in a street the adjacent owner has these remedies: he may bring successive suits to recover his damages; he may bring an action in equity to restrain the operation of the road and compel the abatement of the nuisance, or when the highway has been exclusively appropriated, he may maintain an action of ejectment.

The authorities upon the subject of the damages recoverable in actions of trespass collated and discussed.

Lamb v. Walker (L. R., 3 Q. B. Div. 389), disapproved.

(Argued October 26, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 3, 1883, which affirmed an order denying a motion for a new trial, and directed judgment on a verdict.

This action was brought to recover damages alleged to have been caused to certain premises owned by plaintiff in the city of Albany, by the acts of defendant in raising Colonie street in front thereof.

The material facts are stated in the opinion.

Matthew Hale for appellant. Plaintiff can only recover the damages sustained previous to the bringing of the action, and it is error to allow a recovery for a diminution in value based upon the assumption that the nuisance is to continue forever. (*Blunt v. McCormick*, 3 Denio, 283; *Whitmore v. Bischoff*, 5 Hun, 176; *McKeon v. Lee*, 4 Robt. 449; *Duryea v. Mayor, etc.*, 26 Hun, 120; *Carl v. S. & F. R. R. Co.*, 46 Wis. 625; *A. & Gt. W. R. R. Co. v. Robbins*, 35 Ohio St. 531; *Battishall v. Reed*, 18 C. B. 696; *Mahon v. N. Y. C.*, 24 N. Y. 658; *Braklen v. R. R. Co.*, 29 Minn. 41.) The

Statement of case.

rule of damages is the impairment of the rental value of the premises from the time the plaintiff became the owner to the time the action was commenced. (*Taylor v. Met. El. Ry. Co.*, 50 N.Y. Super. 311; *Green v. N. Y. C. & H. R. R. R. Co.*, 65 How. 154; 12 Abb. N. C. 124; *Drucker v. Man. Ry. Co.*, 51 N. Y. Super. 429.) It is sufficient in an action of trespass to allege that the defendant entered upon the plaintiff's land, as such entry, if unexcused, is *prima facie* a wrong, and if the defendant had permission to enter, such permission is a defense which he is bound to set up affirmatively. (2 Wait's Pr. 389.) There is no ground for saying that the raising of the street was a permanent structure. No structure can, in contemplation of law, be permanent unless it can be lawfully maintained. (*Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97; *Craig v. R. & B. R. R. Co.*, 37 id. 404; *Carpenter v. O. & S. R. R. Co.*, 24 id. 656; *Wager v. T. U. R. R. Co.*, 25 id. 526.) The court erred in refusing to charge that if the jury believed that the act of the defendant in raising the street was not unlawful, but was by the permission of the city of Albany, then the defendant was not liable to plaintiff for any injury done to the plaintiff by reason of such change of grade. (Chap. 77, Laws of 1870, p. 169, tit. 3, § 2, subd. 6; Laws of 1870, pp. 177, 178, tit. 3, §§ 13-15; *Gallup v. Albany Railway*, 7 Lans. 471; 65 N. Y. 1-5.)

Amasa J. Parker for respondent. The act of defendant in raising the surface of the street was a wrongful interference with the rights of abutting owners. (*Buckner Case*, 56 Wis. 403; *R. R. Co. v. Hambleton*, 40 Ohio St. 497.) Even the city, while it had power, under certain limitations and conditions with which it was bound to comply, to change the grade, could not have conferred authority for such an act, which was a mere obstruction of a public street. (*St. Vincent Asylum v. Troy*, 76 N. Y. 108; *Brooklyn v. N. Y. Ferry Co.*, 87 id. 205; *Morris v. Manhattan, etc.*, 89 id. 498; *Story v. N. Y. El. R. R. Co.*, 90 id. 123.) The company was bound to restore the street to its former state, or to such state as not unneces-

Opinion of the Court, per EARL, J.

sarily to have impaired its usefulness, and is liable for any injury resulting from its omission to do so. (*Masterson v. N. Y. C. & H. R. R. Co.*, 84 N. Y. 247; *People v. Same*, 74 id. 302; *Richardson v. Same*, 45 id. 846.) It is immaterial whether the plaintiff owned to the center of the street or not, as the cause of action is not trespass, but for the injury to the abutting property caused by the illegal interference with the street. (*Milburn v. Fowler*, 27 Hun, 568; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Knox v. Mayor, etc.*, 55 Barb. 404; *Ross v. Thompson*, 78 Ind. 90; *Stetson v. Faxon*, 19 Pick. 147.) As the nuisance here is a permanent one and will continue without change from any cause but human labor, the damage is an original damage and may be at once fully compensated. (*Troy v. Cheshire R. R. Co.*, 23 N. H. 83; *R. R. Co. v. Hambleton*, 40 Ohio St. 497; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423; *Becket v. M. R. R. Co.*, L. R., 3 C. P. 83-107; *Lamb v. Walker*, L. R., 3 Q. B., 339; *Stodhill v. C. R. R. Co.*, 53 Iowa, 341; *Powers v. Council Bluffs*, 45 id. 652; *C., etc., R. R. Co. v. Stein*, 75 Ill. 42; *C., etc., R. R. Co., v. Hoag*, 90 id. 339; *C., etc., R. R. Co. v. Maher*, 91 id. 312; *Vanderslice v. Philadelphia*, 103 Penn. St. 102; *Beckett v. Midland R. R. Co.*, L. R., 3 C. P., 93.)

EARL, J. Colonie street runs at right angles with and crosses Broadway in the city of Albany, and the defendant's railroad crosses the two streets diagonally at the place of their intersection, and had crossed there for at least forty years before the trial of this action. The plaintiff owned three houses and lots contiguous to each other situate on the northerly side of Colonie street and easterly of Broadway and of the railroad. The lot numbers are 85, 83 and 81, numbered in this order from Broadway. Lots 85 and 83 extend only to the northerly side of Colonie street, while lot 81 extends to the center thereof. When the railroad was originally built the two streets were somewhat raised. About the year 1874 two additional tracks were laid upon the defendant's road where it crossed the two streets, one of which was upon the easterly

Opinion of the Court, per EARL, J.

side thereof, and the road-bed was raised at its intersection with Broadway from two and a half to three feet. It does not appear that either of the tracks or any part of the road-bed was upon any of plaintiff's land or that she received any damage whatever from them. But to accommodate the grade of Colonie street to the grade of the railroad it became necessary to raise the street and sidewalks thereof, and the consequence was that the street and sidewalk in front of plaintiff's lots were elevated about one foot, and all the damage of which plaintiff complains was caused by this elevation.

She alleged in her complaint that her lots extended to the center of the street; that the defendant entered upon her property (meaning her property in the street) and tore up the pavement, raised the street, sidewalks and gutters and so shaped the street and gutters as to pour the water therefrom down over the sidewalk into the basement of her houses by means of which her premises were made liable to be flooded with water, and had been flooded with water and were rendered damp, unhealthy and inconvenient of access, and her property therein had been injured, and the rental value, and the value thereof greatly depreciated. Many exceptions were taken at the trial on behalf of the defendant which its counsel argued before us and relied upon for a reversal of the judgment. But I shall notice those only which have reference to the rule of damages laid down by the trial judge. Upon the trial it was claimed on behalf of the defendant that the plaintiff could recover only such damages as she had sustained up to the commencement of the action. On the contrary her counsel claimed that she could recover damages upon the theory that the embankment placed in the street in front of her lots was to be permanent, and that thus it was a permanent injury to her lots, and so the law was ruled by the trial judge.

A witness for the plaintiff was asked this question: "What in your judgment was the value of these lots, 81, 83 and 85 Colonie street, before the grade was raised?" This was objected to by defendant's counsel as immaterial and incompetent, and the objection was overruled, and the witness answered that

Opinion of the Court, per EARL, J.

each lot was worth \$3,000, and was worth less after the change. Then he was asked this question: "How much would it be worth since the change in the street?" This was objected to by defendant's counsel on the grounds that it was immaterial and incompetent; that a change of market value between 1874 and that time was no evidence of damages in this action; that the question assumes that the damage was permanent; that the proper measure of damages was any injury to the rental value of the premises prior to the commencement of the suit and the cost of restoring the street to its former condition, and that there was nothing in the complaint or in the evidence which rendered material any evidence as to the market value of the property either before or after the alleged wrongful act. The trial judge ruled that he would allow the plaintiff to prove how much the rental of the property had been impaired down to the commencement of the action, and the actual injuries which the property had sustained by the flow of the water into, upon and against it by reason of the change of the grade of the street by the defendant, and to this ruling plaintiff's counsel excepted. Subsequently upon further argument on the next day the judge reversed his ruling and among other things said: "Yesterday an inquiry was made of counsel as to the act of the defendant in constructing the additional tracks and in raising the bed of the road. I understood it to be conceded that the act was a pure trespass, that the dumping of the ground in the street was a trespass, and that the construction of the tracks was a trespass, and the running of the cars was a trespass, and I, therefore, held that no court would be justified in assuming that an act of that character would be permanent; therefore, that the permanent depreciation in value of the property could not be the basis of the damages, but only the depreciated rental during the time of the continuance of the trespass up to the time of the beginning of the suit, and the actual injury which the flooding had done to the property. I think if these facts be conceded, that the plaintiff can only recover the rental which she had lost and the actual injury to the premises down to the time of the bringing of the suit." He then called attention to

Opinion of the Court, per EARL, J.

the complaint and said that it did not charge that the defendant's acts were illegal, or that they were a pure trespass upon the street, and that the pleadings showed that the acts were legally done by the defendant under its charter; and further: "If that proposition be sound how can the court act upon an assumption that here was a mere trespass committed by the railroad company upon a street, which they had no right to do? My decision yesterday rested upon an assumption that purely and simply here was a trespass committed upon the street which the company had no right to commit, and which, because a trespass, the court could not assume would be of a permanent character. Upon that supposition, and upon that theory, it was held that the plaintiff could not recover as for a permanent injury to the property, but must be limited in her recovery to the damages which she had sustained by a loss of rental up to the time of bringing the action and to the actual injury done to the property." Plaintiff's counsel stated that "they had never claimed this was a case of mere trespass; that as to two of the lots they did not own the soil in the street and it could not be a trespass." The trial judge then held that because the acts of the defendant in the street were not illegal or unlawful and, therefore, not a trespass, they might be regarded as of a permanent nature, and that the plaintiff could, therefore, recover for the permanent injury done to her property, and he overruled defendant's objection to the question, and the witness answered that each lot immediately after the change was worth about \$1,500. Similar questions put by plaintiff's counsel to other witnesses were objected to by defendant's counsel, the objections were overruled and the witnesses answered in substantially the same manner. Evidence offered by the defendant to show how much it would cost to restore the street to its former condition was, on the objection of the plaintiff, excluded.

At the close of all the evidence defendant's counsel moved for a nonsuit upon the following grounds: "(1) That no title has been proved in plaintiff in the property in question. (2) There is no proof of any interference by defendant with property in question. (3) Plaintiff has failed to make out a cause of

Opinion of the Court, per EARL, J.

action. And upon the further ground there is no proof of any unlawful or illegal interference by defendant with the property in question." The trial judge said: "I agree with you there is no proof of any illegal interference. That involves another very grave question, I concede that," and he denied the motion and defendant's counsel excepted.

The judge charged the jury that the plaintiff could recover, for the permanent injury to her property, the diminished market value thereof. He was requested by defendant's counsel to charge as follows: "If the jury believe that the act of the defendant in raising the street was not unlawful, but was by the permission of the city of Albany, then the defendant is not, under the proof, liable to plaintiff for any injury done to the plaintiff by reason of such grade." The judge replied: "I decline to charge that. I admit that involves a very difficult problem of law." Defendant's counsel also asked him to charge: "If the jury believe such acts were done without the permission of the city and were unlawful, then the measure of damages would be the actual injury sustained by plaintiff before the commencement of this action, including the loss of rent and the injury to the use and enjoyment of the property before the commencement of the action, if any." And the judge said: "I decline to charge that, because there is no proof one way or the other upon the question. Whether there was an authorized or unauthorized act there is no presumption in favor of the trespass." Defendant's counsel further asked the judge to charge: "That upon the evidence the jury will not be justified in rendering a verdict for the supposed difference in market value in the premises before and after the act in question," and he refused so to charge; and to all the refusals defendant's counsel excepted. The judge then said: "For the purpose of presenting that question sharply, I neglected to charge as I shall do now that the plaintiff can recover the difference in the rental value of the property, provided you find that the act of the defendant has impaired the market value, and to the extent it has impaired it," and to this defendant's counsel also excepted.

At the General Term the rule of damages laid down by the
SICKELS — VOL. LVI.

trial judge was approved for the reasons given by him, to-wit: that the raising of the street was not illegal or unlawful and was apparently permanent. Judge BOARDMAN writing an opinion in which Judge BOCKES concurred, among other things said. "The right of the defendant to occupy the street must be presumed from the length of time it has used it." "We cannot say that plaintiff had any title to the street, or that the occupation of the street by the defendant was unlawful." Judge LEARNED concurred in the result apparently with some hesitation. He said that in regard to the question of damages, he thought the matter did not depend altogether "on the permanency of the structure;" that if A. trespasses on the land of B. and erects a structure, however permanent, he supposed that in an action for trespass damages could be recovered only for injuries up to the time of the commencement of the action, and that if the trespasses were continued, another action could be brought. But he seemed to be of opinion that, as the railroad company could legally acquire property needed for its track and a right to construct its road upon a street, when they have taken possession and have in fact used a street in a manner indicating a permanent use, it is not unreasonable that in an action against them damages should be recovered for the whole injury.

I have thus carefully and fully stated these facts to show the precise theory upon which the damages were recovered at the trial term and the judgment was affirmed at the General Term; and that the theory is fundamentally and radically erroneous, I can have no doubt.

Railroads are authorized to be built by law; but before a proposed railroad can be lawfully built its builders must obtain the right of way; they cannot take private property for that purpose without first making compensation therefor, and if they do, they become trespassers. If the railroad be built upon or over a highway the public right or license must be obtained not only, but so far as individuals own private rights or interests in the highway or the soil thereof, they must also be lawfully acquired; and it is equally true whether the railroad

Opinion of the Court, per EARL, J.

be built upon a highway or be built elsewhere without acquiring the private right or property, that the builders are liable for all the damages suffered by the owners of such rights and property. As to them and their rights the railroad is unlawful, a continuing nuisance which they can cause to be abated, and so it has been settled by repeated decisions. (*Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97; *Mahon v. N. Y. C. R. R. Co.*, 24 id. 638; *Plate v. N. Y. C. R. R. Co.*, 37 id. 472; *Henderson v. N. Y. C. R. R. Co.*, 78 id. 423; *Story v. Elevated R. R. Co.*, 90 id. 122; *Mahady v. B. R. R. Co.*, 91 id. 148.)

But wherever a railroad is lawfully built with proper care and skill, there it is not a nuisance. What the law sanctions and authorizes is not a nuisance although it may cause damages to individual rights and private property. If a railroad be built upon a highway, after acquiring the public right and the private property, if any, in the street or the soil thereof, then the owners thereof are not responsible for any damages necessarily resulting from the construction or operation of the railroad to private property adjacent or near to the road, and so too the law has been settled in this State by many decisions. (*Radcliff's Executors v. Mayor, etc.*, 4 N. Y. 195; *Davis v. Mayor, etc.*, 14 id. 506; *Bellinger v. N. Y. C. Railroad Co.*, 23 id. 42; *Kellinger v. Forty-Second St., etc., Railroad Co.*, 50 id. 206.) The case of *Fletcher v. A. & S. Railroad Co.* (25 Wend. 462), so far as it holds a contrary doctrine, has been overruled by the cases just cited.

Here there was no complaint that the work done by the defendant in the street was not done with sufficient care and skill, and it was assumed at the trial that it was legally and lawfully done and that the defendant was not a trespasser in the street. That assumption implies that the defendant had the public license to do what it did not only, but also that it invaded no property rights of the plaintiff in the street. The assumption was warranted by the facts. This railroad company in a populous city had been there for a large number of years, and it cannot be assumed that it was there without right, and there is no allegation

Opinion of the Court, per EARL, J.

in the complaint that it was. There was no proof that the railroad embankment was made any wider on the easterly side toward the plaintiff's lots, and hence it may be assumed that the additional track was laid upon its embankment and under rights early acquired and long possessed by it at that place. As before stated, there is no proof that either the railroad tracks or any part of the railroad embankment was placed upon the soil of the plaintiff in the street, and in fact neither was. Even if plaintiff's lots were bounded southerly by the center of Colonie street all the defendant did was to raise the street and sidewalk in front of her lots so as to conform the grade of the street to the grade of the railroad and of Broadway, over which it passed. This we must assume it had from the city the right to do, and so much it was bound by law to do under the General Railroad Act (Laws of 1850, chap. 140, § 28, subd. 5) by which it was bound to restore the street to "such state as not unnecessarily to have impaired its usefulness." Here there was no allegation nor proof that the street as a street for travel was in any way injured, and much less that its usefulness was unnecessarily impaired. It was not, in front of plaintiff's premises, by the act of the defendant, devoted to any thing but street purposes, and as the city could have raised the grade of the street without liability to abutting owners, so it could authorize the defendant to do so without such liability. We have a case then where the defendant did acts in the street entirely lawful and where it was held liable for the consequential damages to the plaintiff's adjacent property, caused by the careful use of its lawful authority and the proper exercise of its legal rights. To uphold this recovery upon such a theory would subvert a very important rule of law about which there has been no substantial question in this State for at least thirty years. The rule was recognized by all the judges who wrote opinions in *Story v. Elevated Railroad Co.*, and by the judge who wrote in *Mahady v. Railroad Co.*, the latest cases in which the rule has been under consideration here.

Even if the assumption that the acts done by the defendant in Colonie street were lawful was not warranted by the facts,

yet as the lawfulness of the acts was assumed by the court, and substantially conceded by plaintiff's counsel at the trial, the assumption should prevail here, because but for it the defendant might have proved that its acts were lawful.

But the learned counsel for the plaintiff, as we understand his brief, does not attempt to sustain this judgment upon the theory adopted by the trial judge. He claims that the interference by the defendant with the street was unlawful and a nuisance, and that, therefore, the plaintiff was entitled to recover damages caused thereby; and if he is right in his contention that this embankment placed in the street by the defendant was unlawful and therefore a nuisance, then the plaintiff was entitled to recover damages. The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? We have here for consideration an important principle of law which has to be frequently applied and which ought to be well known and thoroughly settled. There never has been in this State before this case the least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere. In *Hambleton v. Veere* (2 Saund. 169, 170), the learned annotator in his note says: "So in trespass and in tort, new actions may be brought as often as new injuries and wrongs are repeated; and, therefore, damages shall be assessed only up to the time of the wrong complained of." In *Rosewell v. Prior* (2 Salk. 459, 460), the plaintiff being seized of an ancient house and lights, defendant erected a building whereby plaintiff's lights were estopped. There was a former recovery for the erection and the second action was for the continuance of the erection; and it was held that the former recovery was not a bar. In *Bowyer v. Cook* (4 M., G. & S. 236), there had been an action of trespass for placing stumps and stakes on plaintiff's land, and

Opinion of the Court, per EARL, J.

the defendant paid into court in that action, forty shillings which the plaintiff took in satisfaction of that trespass. The plaintiff afterward gave the defendant notice that unless he removed the stumps and stakes a farther action would be brought against him; and in the second action it was held that the leaving the stumps and stakes on the land was a new trespass, and that the plaintiff was entitled to recover. In *Holmes v. Wilson* (10 A. & E. 503), the action was trespass against a turnpike company for continuing buttresses on plaintiff's land to support its road. Plaintiff had recovered compensation for the erection of the buttresses in a former action and the money had been paid into court and received by him; and it was held that after notice to defendant to remove the buttresses, and a refusal to do so, plaintiff might bring another action of trespass against the company for keeping and continuing the buttresses on the land, and that the former recovery was not a bar to such an action. In that case it was argued for the defendant that the damages given in the first action were to be regarded as a full compensation for all injuries occasioned by the buttresses, and were to be considered as the full estimated value of the land permanently occupied by the buttresses; that the damages were in respect of prospective as well as past injury, and that the judgment operated as a purchase of the land. PATTERSON, J., said in reply to the argument: "How can you convert a recovery and payment of damages for the trespass into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it;" and it was argued by learned counsel for the plaintiff in reply to the argument that the former judgment operated as a purchase of the land: "As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be, that a person who wants his neighbor's land might always buy it against his will, paying only such purchase-money as a jury might assess for damages up to the time of the action. If the property was changed when did it pass? Suppose the plaintiff had brought ejectment for the part occupied by defendant's buttresses, would the recovery of damages in trespass

Opinion of the Court, per EARL, J.

be a defense? There is no case to show that when land is vested in a party and fresh injuries are done upon it, fresh actions will not lie." (See, also, *Thompson v. Gibson*, 8 M. & W. 281; *Mitchell v. Darley Main Colliery Co.*, L. R., 14 Q. B. D. 125; *Whitehouse v. Fellowes*, 10 C. B. [N. S.] 765.) I find no case in England now regarded as authority in conflict with these cases. The case of *Beckett v. Midland R. R. Co.* (L. R., 3 C. P. 82) does not lay down a different rule. That case arose under the Land Clauses Consolidation Act and the Railroad Clauses Consolidation Act, which require full compensation to be made by railroad companies not only for lands taken but also for damages to lands injuriously affected. Under those acts the plaintiff recovered, not only the value of his lands taken, but for permanent injury to his other lands. The case of *Lamb v. Walker* (L. R., 3 Q. B. D. 389) was overruled in *Mitchell v. Darley Main Colliery Company* (*supra*) and is no longer authority in England.

The same rule of damages which I am trying to enforce prevails generally and with very rare exceptions in the other States of this Union. In *Esty v. Baker* (43 Me. 495), APPLETON, J., said: "The mere continuance of a building upon another's land, even after the recovery of damages for its erection, is a trespass for which an action will lie. In *Russell v. Brown* (63 Me. 203), the action was trespass *quare clausum* for continuing upon the plaintiff's land the wall of a building nine inches wide and one hundred and six feet long. The defendant pleaded in bar a former judgment recovered for building the wall, and satisfaction; and it was held that the mere continuance of a structure tortiously erected upon another's land, even after recovery and satisfaction of a judgment for its wrongful erection, is a trespass for which another action of trespass *quare clausum* will lie, and that a recovery with satisfaction for erecting a structure does not operate as a purchase of the right to continue such erection. In *C. & O. Canal Co. v. Hitchings* (65 Me. 140), the action was trespass for filling about two hundred yards of canal, and the justice instructed the jury *inter alia*: "Whatever diminution there is in the value of the

Opinion of the Court, per EARL, J.

property by reason of the trespass is an element of damage." The defendant excepted to this instruction, and it was held erroneous; that the recovery should have been limited to such damages as were sustained down to the commencement of the action. WILTON, J., writing the opinion, said: "It is now perfectly well settled that one who creates a nuisance upon another's land is under a legal obligation to remove it, and successive actions may be maintained until he is compelled to do so;" "the doctrine of all the cases is, that a recovery of damages for the erection of a building or other structure upon another's land does not operate as a purchase of the right to have it remain there; and that successive actions may be brought for its continuance until the wrong-doer is compelled to remove it;" "as a necessary result of this doctrine it has been held — and we think correctly — that in the first action brought for such a trespass, the plaintiff can recover such damages only as he had sustained at the time when the suit was commenced. Because for any damage afterward sustained a new action may be maintained; and the law will not allow two recoveries for the same injury." "The injury complained of was the filling up of the canal. The defendant, acting under authority from the city of Portland, had extended Commercial street, over and across the canal by means of a solid embankment. No opening was left for the passage of either boats or water. Assuming that this embankment was unlawfully placed there — that the canal should have been bridged, not filled up — and we have a nuisance upon the plaintiff's land; something placed there which can, and, in contemplation of law, ought to be removed. For such an injury successive actions may be maintained until a removal is compelled. The damages must, therefore, be limited to such as the plaintiff has sustained at the date of the writ. The rule given to the jury, namely, that the measure of damages was the diminution of the value of the property was inappropriate, and must have led to an erroneous result." In *Bare v. Hoffman* (79 Penn. St. 71), the plaintiff had a dam from which he conducted water to his tannery and the defendant made a dam below into which the surplus

Opinion of the Court, per EARL, J.

water over plaintiff's dam flowed, and from his dam the defendant, by a pipe, conducted the water to his tannery, by which the plaintiff lost the use of the water required to carry the offal from his tannery, and it was held that evidence of permanent injury to the market value of plaintiff's tannery was inadmissible; that the injury was not of such a character as to assume that it would be permanent and to assess damages accordingly; and that as a general rule successive actions may be brought so long as the obstruction is continued. *MERCUR, J.*, writing the opinion, said: "The general rule is that successive actions may be brought as long as the obstruction is maintained. A recovery in the first action establishes the plaintiff's right. Subsequent actions are to recover damages for a continuance of the obstruction." In *Thompson v. Morris Canal & Banking Co.* (17 N. J. L. 480), it was held that the title to lands does not pass by a verdict for the plaintiff, in an action of trespass; that it remains in the plaintiff, and, therefore, a verdict for damages to the full value of the land is manifestly wrong. In *Thayer v. Brooks* (17 Ohio, 489), the action was case, for nuisance in diverting water from the mill of the plaintiff. The injury complained of in the declaration was that the mill was rendered less useful by reason of a diversion of a portion of the water from the stream by means of a canal cut by defendant. The court instructed the jury that the owner of the mill was entitled to recover such damages as the jury believed he had sustained by the mill-site having been diminished in value in consequence of the diversion of the water. *BIRCHARD, Ch. J.*, writing the opinion, said: "This was going too far. Suppose the party liable at all he was only liable under any form of declaration for the damages actually sustained prior to the commencement of the suit."

In *Anderson, etc., R. R. Co. v. Kernodle* (54 Ind. 314), it was held that where a railroad company in the construction of its road-bed, without taking the steps prescribed by law to condemn its right of way, unlawfully enters upon and takes possession of land, and suit is brought by the owner thereof, to recover damages for such trespass, the damages assessed should include compen-

Opinion of the Court, per EARL, J.

sation for the injury inflicted and such punitive damages as are authorized by law, but not the value of the land so used or appropriated; that in such an action no judgment that the court trying such cause is authorized to render will give the railroad company a title to the land appropriated. In *Harrington v. St. P. & Sioux City R. R. Co.* (17 Minn. 215), where the defendant had built its road in the street adjoining plaintiff's land, it was held that it was a continuing nuisance for which successive actions could be brought, and an equitable action for an injunction was sustained for the reason that it would obviate the necessity of a multiplicity of suits. In *Adams v. Hastings & Dakota R. R. Co.* (18 Minn. 260), the plaintiff was the owner and in possession of a lot situated on the side of the street which also extended to the center of the street, subject only to a public easement to use the same for street purposes. The defendant, a railroad company, without first acquiring the right so to do, constructed its road along the street in front of plaintiff's premises; and it was held that the defendant in thus appropriating the street to its own use was a trespasser, and that its acts constituted a private nuisance as against the plaintiff entitling him to maintain an action therefor, and that the damages would be for the unlawful withholding of the possession of the premises up to the commencement of the action. RIPLEY, Ch. J., writing the opinion, said: "As there is no presumption of law that such illegal running of trains and other trespasses will be continued in the future, that the unlawful act of to-day will be repeated on the morrow, it is, of course, obvious that while the jury in the present case could assess past damages, they could not assess the permanent damages to accrue from an assumed continued use thereafter of the land by the defendant in the same way." In *Ford v. C. & N. W. R. R. Co.* (14 Wis. 609), the owner of lots abutting on a street in a city brought an action against a railroad company to recover damages caused by the construction of its road-bed through the street in front of his lots, and for an injunction restraining the defendant from laying down its rails in front of his property. DIXON, Ch. J., in writing the opinion, said: "It seems that the past damages, or those occasioned by the trespass, might have

been assessed by the court, or the judge might have ordered a jury for that purpose; but the permanent damages, or those which would accrue to the plaintiff by the continued use of the land by the company, can only be ascertained in the manner prescribed by the statute." In *Carl v. S. & F. du L. R. R. Co.* (46 Wis. 625), the complaint alleged that plaintiff owned in 1869, and continued to own until 1873, a city lot with a dwelling-house thereon; that in 1869, defendant constructed its road with embankment and ditches along and on each side of the center of the street, in front of the lot, and maintained the same to the commencement of the action, and thereby obstructed access to the house and lot, and diminished their value; that by reason of the premises plaintiff, before the commencement of the action, was compelled to sell, and did sell, his property for a sum less by \$1,000 than could otherwise have been procured for it, and that defendant had refused on demand to make compensation for the injuries so sustained, and had taken no steps under its charter to have the damages ascertained; and judgment was asked for the sum of \$1,000; and it was held, that the action must be treated as one for damages for a continuing trespass, and that the complaint stated facts sufficient to sustain such an action; that the plaintiff in such an action, however, can recover nothing more than the damages to the property resulting from the trespass between the building of the road and the commencement of the action; that such a recovery would be no bar to a future recovery by plaintiff or his grantee for subsequent damages to the property by a continued maintenance of the road; and that evidence of the permanent depreciation in the value of the land resulting from such road was inadmissible. The judge writing the opinion said: "The recovery in the present action will be a bar only as to damages sustained previous to the commencement of the same, and the plaintiff or her grantees can recover in another action for any injury caused to the lot by the maintenance of such railroad subsequent to the commencement of this action." In *Blesch v. C. & N. W. R. R. Co.* (43 Wis. 183), it was held that the rule of damages in such a case as this is the difference in value of the use of the lot, without

Opinion of the Court, per EARL, J.

the railroad track and with the railroad track, between the date of building the same and the commencement of the action. Justice COLE, in delivering the opinion, said: "The damages recoverable in the action are, of course, for the past injury to the freehold and possession; that is, the pecuniary loss which the trespass had caused the plaintiff in the use and enjoyment of his property when the suit was commenced." And further; "One reason why a railroad company can be charged with the permanent damages for taking land for its use only in a proceeding under the statute for asserting the right of eminent domain is, that when such damages are paid the company is entitled to have a clear title to the property so taken, and such title cannot be acquired in an action for a trespass or nuisance. Another reason is that in the action to recover damages for the nuisance, the plaintiff may have judgment to abate the nuisance, and it would be clearly unjust that the plaintiff should recover damages for a continuance of the nuisance and at the same time have judgment to abate and remove the same." (See, also, *S. & O. Canal Co. v. Bourquin*, 51 Ga. 379.)

In harmony with these authorities are the views of approved text-writers. (3 Blackst. Com. 220; Sedgwick on Dam. 155; Mayne on Dam. [1st Am. ed.], §§ 110, 111; 1 Sutherland on Dam. 199, 202; 3 id. 369, 399.) While the authorities in other States are not entirely harmonious, those which I have cited give the general drift of the decisions.

But whatever difference there may be in other States as to the rule of damages under consideration, in this State there is none whatever here. Here the authorities are entirely uniform that in such an action as this, damages can be recovered only up to the commencement of the action, and that the remedy of the plaintiff is by successive actions for his damages until the nuisance shall be abated. The law was so announced in *Greene v. New York Central & Hudson River R. R. Co.* (65 How. Pr. 154); *Taylor v. Metropolitan Elevated Ry. Co.* (50 N. Y. Super. Ct. 311); *Duryea v. Mayor, etc.* (26 Hun, 120), all cases entirely analogous to this. In *McKeon v. See* (4 Robertson, 449) it was held that the only damages which the

plaintiff is entitled to recover in an action against an adjoining owner for a nuisance upon the premises of the latter are those for a depreciation of the rent and loss of tenants caused by such nuisance previous to the commencement of the action. In *Whitmore v. Bischoff* (5 Hun, 176), it was held that the damages which a party can recover for a private nuisance are those which he has sustained previous to the bringing of the action, and that it is error to allow a recovery for the diminution in value of the premises based upon the assumption that the nuisance is to continue forever. In *Duryea v. Mayor, etc.* (26 Hun, 120), the action was brought to recover the damages occasioned by the wrongful act of one who had discharged water and sewage upon the land of another, and it was held that no recovery could be had for damages occasioned by discharge of water and sewage upon the land after the commencement of the action. In *Blunt v. McCormick* (3 Denio, 283), the action was case for damages in consequence of the erection of a building adjoining plaintiff's, whereby plaintiff's light was obstructed. The plaintiff was defendant's tenant. The court at the trial charged the jury that if the plaintiff was entitled to recover they should give damages for the injury which he would suffer during the whole of his term. It was held that his charge was erroneous, and that a recovery could be had only for such damages as had occurred at the time the suit was commenced and not for the whole term. In *Plate v. New York Cent. R. R. Co.* (37 N. Y. 472, 473), the action was brought to recover damages caused by keeping and maintaining the defendant's railroad track and ditches along the side thereof in such manner as to cause the water to flow back upon the plaintiff's land. There had been a former recovery of damages for the same cause which was alleged as a bar to the second action; but it was held not to be a bar. The judge writing the opinion said: "If indeed he could have recovered damages not only for all injuries which had occurred previous to the commencement of the action, but also for all injuries which may possibly thereafter occur, the first recovery would be a bar to the second." In *Williams v. Railroad Co.*, and

Opinion of the Court, per EARL, J.

Story v. Railroad Co., a resort to equity was allowed, because the necessity of bringing successive actions to recover damages would thus be obviated. If in those cases the plaintiffs could have recovered all their damages, past and prospective, in actions at law, equitable actions would have been unnecessary and unauthorized. The case of *Mahon v. New York Cent. R. R. Co.* (24 N. Y. 658) is a precise authority, and if there were no other ought to control the decision of this case. In that case the railroad company constructed its road and laid its tracks upon a highway in front of Mahon's premises. His title to the adjoining premises extended to the center of the street, and in 1842 he commenced an action against the railroad company to recover damages in consequence of the construction and operation of the railroad in the highway in front of his premises; and he recovered a judgment. Afterward he died and then his executors instituted an action to recover damages sustained during his life-time subsequently to the former recovery for a continuance of the railroad and its continued operation in the street; and to the last action the defendant interposed as a defense the former recovery, and it was held not to be a bar. As disclosed by the printed papers to be found in the State library, the declaration in the first action contains four counts. In the first and fourth, among other things, it was alleged that the plaintiff lawfully owned and possessed a lot and dwelling house thereon, and that the defendant caused to be wrongfully constructed an embankment of earth of the height of five feet in front of his premises and wrongfully continued and maintained the same and operated its railroad thereon, by means whereof he could not have and enjoy his free and unobstructed passage into and upon his lands and to and from his dwelling-house, and his lot and dwelling-house were flooded with water and rendered damp, and his buildings and property were greatly injured and depreciated in value. It is thus seen that the character of the injuries complained of in that action were like those complained of here, and that a depreciation in the value of the property was claimed. If the complaint here is broad enough to recover for

permanent diminution of the value of the property upon the theory that the nuisance was to be permanent, so the declaration there was broad enough to recover damages upon the same theory; and if the facts of this case are sufficient to justify and uphold a recovery for permanent injury and diminution in value of the property, so clearly were the facts of that case. In the argument before this court of the second case, which is above cited, it was claimed that the declaration in the first suit was broad enough to embrace the damages which Mahon's property sustained by the construction of the railroad through all time, and that whether it was or not the result should be the same, as the damages resulting from the construction of the railroad were incapable of being split up and made the subject of an infinite number of actions; and that the true rule in such a case was that the plaintiff was at liberty to prove and the jury were bound to consider what damages might probably be the result of the act complained of, and the finding in one case must embrace all the damages. On the other hand it was claimed that the plaintiff in that suit could have recovered damages legally only up to the commencement of the suit. The court at the trial of the second action held that the former recovery was a bar, and upon that ground nonsuited the plaintiffs. They then appealed to the General Term where the prevailing opinion for affirmance was written by Judge ALLEN. He held that the former recovery was a bar; but stated in his opinion that "if the wrong complained of had been a technical nuisance, in the legal sense of the term, a recovery for damages for the erection would not bar an action for the continuance;" that "every day's continuance would be a legal wrong for which an action would lie;" that "a right cannot exist to continue a nuisance, and every party affected by it may insist upon its removal, and the neglect to comply with the duty resting upon a party to abate a nuisance which he has either erected or maintains gives an action to any party injured by the neglect." But he held that the railroad was not to be treated as a nuisance, and that the company had permanently appropriated the highway to its use, and therefore permanent damages could be re-

covered; and his opinion, if sound, would uphold this recovery. Judge PRATT wrote a dissenting opinion, taking an opposite view. In his opinion he said: "If the injury complained of was of that nature that he was entitled to recover prospective damages, he should have proved them in that suit. The law will not suffer a party to unnecessarily split up demands and thus needlessly multiply suits;" and further: "The track and embankment would under such circumstances be a continuing nuisance, and the defendants would be liable to a new action every day so long as they kept it up, and damages would accrue to the owner. A person by erecting a nuisance on the lands of another or by trespassing on such lands acquires no right thereby, and a recovery of damages for the injuries sustained does not have the effect to vest the title in the wrongdoer as in the case of a conversion of personal property;" and here the judgment was unanimously reversed. CLERKE, J., writing the opinion, commenced by saying: "If the plaintiff's testator could have recovered all that he was entitled to in the first action, it is of course a bar to the second; and this depends chiefly, though not altogether, upon the question whether the Utica and Schenectady Railroad Company in any way transcended the authority constitutionally vested in them by the legislature. If they did their road is a nuisance — a perpetual nuisance, and every day's continuance of it is a legal wrong, for which they are liable in damages after they have accrued." And he held that the railroad company did transcend its authority by entering upon the highway without first causing Mahon's damages to be assessed and paid, and that the illegal appropriation of the highway made it liable to damages in successive actions as the damages accrued; and he further said: "The railroad company, therefore, having without compensation to those entitled to the reversion of the lands, constructed, maintained and operated their road upon the highway in question, acted and continued to act unlawfully, and are liable to damages from time to time as they accrued, and on this ground the second action is maintainable." In the course of the opinion this language is used: "If they did not

Opinion of the Court, per EARL, J.

transcend their authority, and yet, in constructing their road, have necessarily injured the rights of others, they are equally liable to respond for prospective as well as accrued damages; and in such case they cannot be vexed again in a second action." It is not apparent precisely what was meant by this phrase. It is a mere *dictum*, and certainly announces an erroneous rule of law. It may be that the learned judge was misled by the doctrine apparently laid down in *Fletcher v. Auburn & Syracuse R. R. Co.* (*supra*). The same judge in *Plate v. N. Y. Cent. R. R. Co.* (*supra*), speaking of that paragraph, says: "I am inclined to think there is some clerical or typographical mistake here, or perhaps there was some inadvertence on my part in the haste of writing," and that it "can at most be considered nothing more than a *dictum*, and, therefore, cannot control the present case."

There is no authority to be found in this State holding any other rule of damages in such a case. The case of *Henderson v. New York Cent. R. R. Co.* (78 N. Y. 423) is not in conflict as that was an equitable action; and in the opinion written in that case the rule is recognized to be otherwise in actions at law; and the case of *Mahon v. N. Y. Cent. R. R. Co.* is expressly recognized, and it was certainly not intended to overrule or depart from it or any of the prior authorities. The judgment there was based entirely upon equitable principles, and there it was ordered that upon payment of the sum awarded by the referee, the plaintiff should convey the title to the defendant. If the case of *Mahon v. R. R. Co.*, supported as it is by abundant authority and based upon common-law principles, which in this State have always been recognized, is to be disregarded in the decision of this case, it had better be distinctly overruled and no longer left to lure the legal wayfarer by its false light. (See, also, *Schell v. Plumb*, 55 N. Y. 592, 598.)

The rule contended for by the plaintiff and affirmed by the Supreme Court in this case would lead to some embarrassments and to great inconvenience. The plaintiff's recovery cannot divest her of any legal rights she has in the street, either to an

easement or to the soil; and if we may assume that her recovery would bar any future recovery for the precise embankment and the precise use thereof, which existed at the time of the commencement of her action, yet it would not bar a recovery if there should be a change in the embankment or the use thereof. If the defendant should run a few more trains of cars, or raise its embankment, or widen it, or change it in any way, the plaintiff would be permitted to institute a new action and to repeat her action every time there should be any change. And yet she has recovered damages in this action upon substantially the same theory damages would have been awarded if there had been an appraisalment under the statute which vests title in the defendant. If the rule affirmed be the correct one, then a railroad company authorized to construct its road may enter upon the lands of any private person and take them, and in a suit for trespass the plaintiff must recover his entire damages and the railroad company must become substantially vested with the title to the land; and thus instead of conforming to the statute it may acquire land by a pure trespass. And so the owner of land instead of resorting to the constitutional tribunal for the appraisalment of his damages may have them appraised by an action which really vests no perfect title. Can the statute of frauds be subverted and a perpetual easement or right in land without a grant be thus conveyed by mere estoppel? In this case has happened what may happen in many cases: The defendant supposed, and had the right in good faith to suppose, that it had satisfied plaintiff's damages and acquired all her property interest in the street until the verdict of the jury undeceived it; and then if the verdict shall stand, it became obliged to pay her for perpetual damages, although they had come to an end, and to make the same compensation which it would have been required to make if it had acquired a perfect title under the statute; and yet it is left without a perfect title liable to successive suits on the claim to be established on the uncertain evidence of witnesses that its burdens upon or interference with the street had been changed or increased. It was not left the option either to abate the alleged nuisance or to

perfect its title, in the mode prescribed by law, to any easement or interest the plaintiff might have in the street.

The law will not proceed upon the assumption that a nuisance or illegal conduct will continue forever. The impolicy and absurdity of such an assumption is illustrated in this case as the defendant offered to prove, and hence it may be taken as true, that since the commencement of the action it has reduced the street to its former grade.

The rule laid down in the cases which I have cited, and which I contend is the true one, gives any party who has suffered any legal damages by the construction or operation of a railroad, ample remedy. He may sue and recover his damages as often as he chooses, once a year or once in six years, and have successive recoveries for damages. He may enjoin the operation of the railroad and compel the abatement of the nuisance by an action in equity; and where his premises have been exclusively appropriated, or where a highway, in the soil of which he has title, has been exclusively appropriated by a railroad, he may undoubtedly maintain an action of ejectment. (*Brown v. Galley*, Hill & Denio's Supp. 380; *Els v. Daily*, 20 Barb. 32; *Redfield v. Utica, etc., R. R. Co.*, 25 id. 54.) It certainly cannot be necessary to subvert the law as it has been well established in order to give the plaintiff ample remedy for any wrong which the defendant has done or can do her in the street in front of her premises. Nor can it be expedient to introduce into the nomenclature of the law a new action, one to recover for the conversion of real property to be followed by the same consequences as an action for the conversion of personal property.

As to this rule of damages, it matters not what the form of the complaint in the first action was. The plaintiff is bound to recover in his first action all the damages to which he is entitled. If he is entitled to damages for permanent injury to his property, it is not optional for him to split them up and recover part of them in the first action and then bring subsequent actions for the rest. If entitled to recover damages only up to the commencement of his action, no form of com-

plaint will entitle him to recover more. In the case of *Mahon v. Railroad Company*, it was proved that the former recovery was for damages only to the commencement of the former action, and yet that circumstance was not deemed material.

Since writing the above, the case of *City of North Vernon v. Voegler* (2 N. East. Rep. 821), containing a very elaborate opinion, has come to our attention. I have carefully examined that case and find that it is not authority for the plaintiff on the question now under discussion. There the city had the right to grade one of its streets, but did it so negligently as to cause damage to the adjoining lots of the plaintiff, and it was held that he could recover, and was bound to recover all his damages in a single action. It was decided that in the absence of negligence there would have been no liability for consequential damages caused by what was rightfully done in the street. The judge writing the opinion said: "Our decisions have long and steadily maintained that municipal corporations are not responsible for consequential injuries resulting from the grading of streets when the work is done in a careful and skillful manner; but they have quite as steadily maintained that where the work is done in a negligent and unskillful manner the corporation is liable for injuries resulting to adjacent property." Here there was no allegation or proof or claim of negligence or unskillfulness in the construction of the embankment in the street, and, as I have shown, it was assumed and conceded upon the trial that it was lawfully and legally constructed. The trial judge did not submit to the jury any question of negligence, but charged them if they found against the defendant as to the release then it was absolutely liable for plaintiff's damages, and that the only question for their consideration was the amount of the damages. Hence that case is an authority for the views I have expressed upon the first ground of error herein discussed. But the case is also inferentially authority for the second ground of error upon which I have based my conclusion. The judge writing the opinion there is very careful to place his decision upon the ground that

Opinion of the Court, per EARL, J.

the structure in the street was rightful, but negligently made, and he recognized the rule, as to successive actions, to be different where the structure is wrongfully in the street and is there a nuisance. He said: "This is not the case of a nuisance. It is the case of a negligent improvement in a street. The improvement was in itself rightful and legal, but the manner in which the improvement was made was wrongful. The wrong was not in grading the street but in the manner of doing it. It is not a nuisance for a municipal corporation to grade its streets; but it is an actionable wrong to do it negligently. The wrong in negligently grading the street is the basis of the action, for there are no facts alleged constituting a nuisance. It is not a nuisance to do what the law authorizes, but it may be a tort to do the authorized act in a negligent manner. It is evident, therefore, that the cases which hold that the continuance of a nuisance will supply ground for an action have no influence upon this case," and hence those cases were not cited. It is clearly to be inferred that if that court had been dealing with the case of an unlawful embankment placed in the street, it would have held that successive actions could be maintained. But I am of opinion that that decision is clearly unsound as to the precise question adjudged. What right was there to assume that the street would be left permanently in a negligent condition and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation under proper authority may erect an embankment in a street, and if the work be carefully and skillfully done it cannot be made liable for the consequential damages to adjacent property. But if it be carelessly and unskillfully done, it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment, and this it may do after its carelessness and unskillfulness and the consequent damages have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it?

Statement of case.

Does it establish the right to continue to be a wrong-doer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken and foresee them long before, it may be many years before they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued and that the wrong-doer will not discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this State, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated. But whether that case was properly decided or not, it is not in conflict with the conclusions I have reached in this case, but is in entire harmony with them.

Therefore, upon both grounds considered in this case there should be a reversal of this judgment and a new trial.

All concur, except DANFORTH, J., dissenting, and MILLER, J., not voting.

Judgment reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM THOMAS MURPHY, Appellant.

The provision of the Code of Civil Procedure (§ 834) prohibiting physicians and surgeons from disclosing information acquired in attending a patient is applicable to criminal actions. (Code of Criminal Procedure, § 392.)

Where, upon the trial of an indictment for abortion, a physician who after the commission of the alleged crime attended upon the female upon whose person it was alleged to have been committed, was allowed to give, as a witness for the prosecution, his opinion as a medical expert, that the crime had been committed, founded upon what he observed as to the physical condition of the woman and upon her narrative of the facts, and it appeared that she was alive at the time of the trial. *Held* error.

Also *held*, the fact that the physician was selected and sent by the public prosecutor to attend upon the female did not affect the question; that as

Statement of case.

she accepted his services in his professional character the relation of physician and patient was established between them.

Pierson v. People (79 N. Y. 424), distinguished.

Also held, that although she was a party to the crime, her declarations, which were simply a narrative of a past transaction and constituting no part of the *res gestæ* were not admissible.

(Argued November 23, 1885 · decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made July 3, 1885, which affirmed a judgment of the Court of Sessions of Monroe county, convicting defendant of the crime of abortion.

The evidence on the part of the prosecution tended to show that defendant arranged with one Dr. S. to perform an operation to procure an abortion and took the female to the office of said doctor, where the operation was performed; that defendant then took her to a boarding-house and arranged for her board and care until after her sickness and paid the bill. After the discovery of the commission of the crime the district attorney sent a physician to attend upon the girl; he called upon her, made an examination of her person and prescribed for her. Upon the trial said physician was called as a witness for the prosecution and was permitted to give his opinion, under objection and exception, that an abortion had been performed, founded upon personal examination so made by him and upon what his patient told him in regard to the matter. The details are given in the opinion.

Horace L. Bennett for appellant. It was error to allow the physician who attended Louise Schlaefer after her miscarriage to disclose information of her condition, acquired while so attending her, or to give an opinion based on that information and what he observed as to her physical condition. (Code of Civ. Pro., § 834; *Grattan v. Met. Ins. Co.*, 80 N. Y. 281; *Edington v. M. L. Ins. Co.*, 67 id. 185; *Dilleber v. H. L. Ins. Co.*, 10 W. Dig. 180; *People v. Stout*, 3 Park. Cr. 670; *Bacon v. Frisbie*, 80 N. Y. 394; *Westover v. Aetna L. Ins.*

Statement of case.

Co., 1 N. E. Rep. 104; Code of Crim. Pro. 329; *Han v. Han*, 1 T. & C. 499; *Sloan v. N. Y. C. R. R. Co.*, 4: N. Y. 125; *Pierson v. People*, 79 id. 424, 432; *Felter v. N. Y. C. R. R. Co.*, 49 id. 42; *Crowley v. People*, 83 id. 464; *Carpenter v. Blake*, 2 Lans. 206; *Swift v. Mass. L. Ins. Co.*, 3 Hun, 531; *Hall v. Crouse*, 13 id. 557; Abbott's Trial Ev. 600; *Wendell v. Mayor, etc.*, 39 Barb. 329; 3 Abb. Ct. App. Dec. 563.) The declarations of Louise Schlaefer as to the character of her sickness, location of her pains, etc., made several days after the operation was performed upon her (if at all), should not have been allowed against the defendant. (*Bacon v. Charlton*, 7 Cush. 581; Abbott's Trial Ev. 600-1; *Werely v. Persons*, 28 N. Y. 344; *Nichols v. B. C. R. R. Co.*, 30 Hun, 437; *Waldele v. N. Y. C. & H. R. R. Co.*, 19 id. 69.)

Joseph W. Taylor, district attorney, for respondent. The evidence of the physician who attended the woman after the operation was performed, as to her condition, was properly received. (Code of Crim. Pro., § 395; *People v. Veeder*, 98 N. Y. 630; 1 Greenl. on Ev., § 102; *Aveson v. Lord Kennaird*, 6 East, 192; *Morriessy v. Ingham*, 111 Mass. 63; *People v. Williams*, 3 Park. 100; *Barber v. Merriam*, 11 Allen, 324; *Pierson v. People*, 79 N. Y. 424; *State v. Geddicke*, 43 N. J. L. 88; *Ins. Co. v. Mosely*, 8 Wall. 397; Roscoe's Cr. Ev. [7th ed.] 27-29.) Mrs. Tripp and Miss Schlaefer were co-conspirators. The evidence of Mrs Pitcher, showing their acts and declarations, was, therefore, properly received. (*Farrell v. People*, 21 Hun, 485; 84 N. Y. 656; *People v. Monnais*, 17 Abb. Pr. 345; *Kelly v. People*, 55 N. Y. 566; *People v. Davis*, 56 id. 103; *People v. Veeder*, 98 id. 630.) The physician, Dr. Herriman, was not prohibited from testifying by section 834, Code of Civil Procedure. (*Pierson v. People*, 79 N. Y. 424; 1 Greenl. on Ev., § 248; 3 R. S. [6th ed.] 671, § 119; 1 Laws of 1880, chap. 245; *Perry v. People*, 86 N. Y. 357; *People v. D'Argencour*, 95 id. 629; *Crandon v. People*, 17 Hun, 490; Laws of 1878, chap. 219; Code of Civ. Pro., §§ 852-869; Code of Crim. Pro., §§ 607, 618,

Opinion of the Court, per FINCH, J.

619; Code of Civ. Pro., §§ 8, 13, 2266, 2292, 3347; 3 R. S. [6th ed.] 1029, § 19; *People v. Restell*, 3 Hill, 295.) The physician, Dr. Herriman, was properly permitted to give his opinion based upon what he learned from observation as well as what the woman told him. (*Matteson v. N. Y. C. R. R.*, 35 N. Y. 492; *Maine v. People*, 9 Hun, 113; *Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 id. 343; *Brown v. N. Y. C. R. R. Co.*, 36 id. 603.)

FINCH, J. We are of opinion that section 834 of the Code of Civil Procedure is applicable to criminal actions, and that whatever possible doubt may have attended the question is fairly dispelled by section 392 of the Code of Criminal Procedure. The confidential character of disclosures by a patient to his attending physician was established, before the Code, by statute, and in terms which, beyond reasonable question, applied to all actions whether civil or criminal. (3 R. S. [6th ed.] 671, § 119; *People v. Stout*, 3 Park. Cr. 670.) That statute was substantially incorporated into the Civil Code, in language broad enough to justify the same general application as that which characterized the older statute; and the further provision of the Code of Criminal Procedure, already referred to, seems to us intended to settle the question. No doubt upon that subject was intimated in *Pierson v. People* (79 N. Y. 424); but in that decision the statute was construed, and we held it did not cover a case where it was invoked solely for the protection of a criminal, and not at all for the benefit of the patient; and where the latter was dead so that an express waiver of the privilege had become impossible. The present is a different case. Here the patient was living, and the disclosure which tended to convict the prisoner inevitably tended to convict her of a crime, or cast discredit and disgrace upon her. We have no doubt upon the evidence that between her and the witness whose disclosure was resisted there was established the relation of physician and patient. Although he was selected by the public prosecutor and sent by him, yet she accepted his services in his professional character, and he ren-

dered them in the same character. She was at liberty to refuse and might have declined his assistance, but when she accepted it, she had a right to deem him her physician and treat him accordingly. It follows that the exception to his disclosure of what he learned while thus in professional attendance was well taken. But if his evidence had been admissible as being competent, another error was committed. He was sent to the patient after the crime was complete, when the abortion had been accomplished, and the patient was merely suffering the physical consequences of the act. Although she herself was a party to that crime, and relatively to it, was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations, narrative of a past occurrence, and constituting no part of the *res gestæ*, were not admissible. These declarations were excluded by the court upon the objection of the accused, and properly excluded. But, notwithstanding, the attending physician was allowed to express his opinion as a medical expert that an abortion had been produced, founding that opinion not only upon what he observed of the physical condition of the woman, but upon all her statements, and upon the history of the case as derived from her. The opinion of the General Term concedes the error of such evidence, but insists that the opinion was founded upon her statements merely of "the locality of the pain, the condition of the injured parts, and so on." We understand what occurred differently. When the witness was first asked his opinion whether the birth occurred from natural or artificial causes, he inquired whether in giving his answer he would be allowed to consider the clinical history of the case as he got it from the girl's statement, to which the prosecutor replied: "Certainly; I ask the question upon the whole history of the case as you learned it from her, as well as from the examination." To this the prisoner objected. The court did not at once pass on the objection, but suggested that the physician answer first from his observation alone. He did so answer and said: "From my physical examination of the woman and the foetus it would lead me to believe that an abortion had been induced," and then added as a reason, that

Opinion of the Court, per FINCH, J.

natural miscarriages were not likely to occur at that stage of pregnancy with the frequency of earlier stages. How weak this evidence was upon the vital point whether the miscarriage arose from natural or artificial causes was made apparent on the cross-examination, where, in answer to the distinct question "whether or not from such physical examination as you describe you made there, is it possible, as a matter of medical knowledge, science and experience, to say that a miscarriage had been produced," the witness felt constrained to answer, "No, sir." The prosecutor, apparently feeling the need of adding some decisive force to the opinion, followed his first inquiry with this question: "On the personal examination that you made of the woman and the foetus, and the history of the case as you got it from her, what do you say now as to whether or not there had been an abortion brought about by artificial means?" To this question the prisoner's counsel objected, as calling for hearsay and a privileged communication, and on the further ground that it involved "the history of the case" which had not been disclosed. The district attorney offered to disclose it, and put the question, what the girl said, which was objected to and excluded. Thereupon the court overruled the objection, and the witness answered: "I say an abortion had been produced." It is not possible on this state of facts to say justly that by the history of the case and the girl's statement was meant only her complaints of present pain and suffering. Nothing of the kind was suggested, or pretended, or could have been understood by court or witness or jury. Indeed, on cross-examination, the witness describes what he meant by the "clinical history of the case;" saying, "I wrote down part of her statement, and testified to it in the police court; and that included how she came there and what happened since she came to that house." So that the opinion of the expert that a crime had been committed, founded upon the narrative of the woman of previous facts, which narrative was itself inadmissible and remained undisclosed, was given to the jury. Necessarily it carried with it damaging inferences of what that narrative in fact was, and drove the accused to the alter-

Statement of case.

native of omitting all cross-examination as to the concealed basis of the opinion, or admitting inadmissible evidence.

We think there was error for which the judgment should be reversed, and a new trial granted, and the proceedings remitted to the Court of Sessions of Monroe county for that purpose.

All concur.

Judgment reversed.

RICHARD POILLON et al., Respondents, v. THE CITY OF BROOKLYN, Appellant.

The authority conferred upon the city of Brooklyn by the charter of 1878 (Subd. 5, § 18, chap. 863, Laws of 1878), to establish and maintain public baths in said city, carried with it, as a necessary incident, power to designate and procure a proper place for the location of such a bath.

Where the city placed a public bath at plaintiffs' pier without their authority or consent,—*Held*, that the city was liable to pay the value of the use of the pier; and that the provisions of said charter requiring contracts for work, materials, and improvements to be made with the lowest bidder, etc., and declaring that "no debt or obligation of any kind shall be created by the common council against the city except by ordinance or resolution," had no application.

(Argued December 8, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 12, 1885, which affirmed a judgment in favor of plaintiffs, entered upon a verdict, and which affirmed an order denying a motion for a new trial.

This action was brought to recover for the use of a pier in the city of Brooklyn belonging to plaintiffs.

The material facts are stated in the opinion.

John A. Taylor for appellant. The legislature having limited the power of the common council to create a debt or obligation against the city to a particular way, no recovery founded

Statement of case.

upon any action of the common council can be had, unless the prescribed way has been followed. (*Brady v. Mayor, etc.*, 2 Bosw. 173; 20 N. Y. 312; *McSpedon v. Mayor, etc.*, 7 Bosw. 601; *McDonald v. Mayor, etc.*, 68 N. Y. 23; *Parr v. Village of Greenbush*, 72 id. 463; *Dickinson v. Poughkeepsie*, 75 id. 65.) Plaintiffs had it in their power to prevent the bath remaining at their pier, and in contemplation of law they consented to its remaining upon the terms offered by the common council — \$50 for 1878 and nothing for 1879 and 1880. (*Heaney v. Heaney*, 2 Den. 625.) The plaintiffs were bound to inquire and to know what provision had been made to pay them. (*McDonald v. Mayor, etc.*, 68 N. Y. 27.)

Albert G. McDonald for respondents. The proper measure of plaintiffs' recovery was such sum as was equal to the reasonable value of the use of the pier in question, as occupied by the bath during the periods mentioned, and from which use plaintiffs were thereby excluded. (Laws of 1872, chap. 320, as amended by chap. 315, Laws of 1877; 3 R. S. [7th ed.], 2031.) The defendant having, without plaintiffs' voluntary intentional action concurring therein, taken possession of and exclusively used plaintiffs' property, the law will fix a liability in some form against defendant to pay the reasonable value of such use. (*Farmers' L. & T. Co. v. Mayor, etc.*, 4 Bosw. 89; *Harlem Gas L. Co. v. City of New York*, 33 N. Y. 311; *Matter of Dugro*, 50 id. 513; *Davies v. Mayor, etc.*, 83 id. 214.) Except in so far and as to the cases in which the mode of contracting is expressly prescribed and limited, and except with respect to contracts the mode of making which is prescribed and limited, valid contracts, even within the scope of the corporate powers, may be made otherwise than under seal or in writing, and in general as with an individual. (Dill. on Mun. Corp. [3d ed.], §§ 447, 459, 460; *Ransom v. New York*, 1 Fisher's Pat. Cas. 254, 274; *Bliss v. Brooklyn*, 4 id. 596; *Murray v. Mayor, etc.*, 1 Bosw. 539; *Knapp v. Simon*, 96 N. Y. 292.)

Opinion of the Court, per DANFORTH, J.

DANFORTH, J. Among other powers conferred upon the common council of the city of Brooklyn was one to establish and maintain one or more public baths, as they might "deem necessary" (Laws of 1873, chap. 863, § 13, subd. 5), and in pursuance of this authority they placed a public bath at a pier owned by the plaintiffs, and maintained it for the use of the public during the years 1878, 1879 and 1880. At the expiration of each year the plaintiffs, without success, demanded of the city, through its officers, compensation for the value of the berth, or place occupied by it for the above purpose, and finally in 1882, brought this action for the enforcement of their claim. The use of the pier was not denied, but the defendant by answer averred that the bath was placed there at the plaintiffs' request, and upon their express agreement that the defendant should not pay and should not be bound to pay to the plaintiffs any sum of money whatever for the use of the pier while so occupied. Upon this issue the jury found against the defendant, and assessing the fair value of the use of the premises while in its possession, found a verdict accordingly. The General Term affirmed the judgment upon the verdict. The learned counsel for the appellant alleges error and rests his contention upon certain provisions of the statute (*supra*, tit. XVII, §§ 1, 3; tit. II, § 10), declaring that all contracts and agreements by which the city shall be liable to pay money shall be under the control of its common council, but when for work, materials, or improvements, shall be made with the lowest bidder after advertisement (§ 1, *supra*), and to be invalid unless certified or indorsed by the comptroller to the effect "that the means required to make the payments under such contract are provided and applicable thereto" (§ 3, *supra*); and further, that "no debt or obligation of any kind shall be created by the common council against the city, except by ordinance or resolution specifying the amount and object of such expenditure (§ 10, *supra*). We think it plain that neither of these provisions have any application to the plaintiffs' case. The transaction which it involved is not within the letter of the prohibition. The plaintiffs have supplied no

Opinion of the Court, per DANFORTH, J.

"work, materials or improvements" to the city, nor do they hold its contract, or any debt or obligation formed by agreement or the meeting of their minds with those of the defendant's officers. Neither have the latter violated, or failed in compliance with, the provisions of the charter. The express authority conferred by it to establish and maintain the bath carried with it, as a necessary incident, power to designate and procure a proper place for its location. This was done, not by agreement with the plaintiffs, but against their remonstrance and in the exercise of that implied power. They are not the less entitled to compensation, and there is nothing in the statute which relieves the defendant from liability for the use of property which it was authorized to take, or from that obligation to do justice which rests upon artificial as well as natural persons. (*Nelson v. Mayor, etc.*, 63 N. Y. 535, 544.) The cases (*McDonald v. Mayor, etc.*, 68 N. Y. 23; *Parr v. Greenbush*, 72 id. 463; *Dickinson v. Poughkeepsie*, 75 id. 65) cited by the appellant are not in conflict with this view. They go no further than to hold that when an express contract, entered into without compliance with the restrictions of a statute, is for that reason void, a recovery for the value of supplies furnished under it cannot be had as upon an implied liability. In the case at bar there was not only no prohibition, but the use of the plaintiffs' property was incidental to the very thing which the legislature had authorized. A recovery might, therefore, have been had even upon an implied contract to pay what that use was reasonably worth, but it is maintainable also upon the duty of the defendant to make compensation for property taken by its officers against the will of the owners.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

Statement of case.

FRANK SEIFERT, Respondent, v. THE CITY OF BROOKLYN, Appellant.

A municipal corporation has no right, in the exercise of its power to determine when, where and how to make improvements, to do so upon a plan which substantially involves the appropriation by it of the property of a citizen to a public use without making compensation therefor.

Where exercise of a judicial or discretionary power by a municipal corporation results in a direct and physical injury to the property of an individual, which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan and the adoption of prudential measures, the corporation is liable for such damages as occur in consequence of its continuance of the original cause, after notice and an omission to adopt measures to remedy the evil.

It seems that immunity from liability for the consequences following the exercise of judicial or discretionary power by a municipal corporation presupposes that the act performed may in some manner be lawfully authorized. Where the act is of such nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is insufficient as a protection.

The rule that a municipal corporation acting under the authority of a statute cannot be subjected to a liability for damages arising from the exercise by it of the authority so conferred, is confined to such consequences as are the necessary and usual result of the proper exercise of the authority. It does not shield the corporation where injury results solely from the defective manner in which the authority was originally exercised and from continuance in wrong after notice of the injury.

Commissioners of sewage and assessment of the city of Brooklyn, in pursuance of the authority given them by statute (Chap. 521, Laws of 1857; chap. 136, Laws of 1861), established a drainage district, not theretofore drained over the lands of plaintiff, and a plan of drainage which contemplated the construction of a main sewer into which lateral sewers to be constructed from time to time should empty. The main sewer was built in 1868, and subsequently various lateral sewers. Soon after the completion of the main sewer, actual use demonstrated that it was insufficient to carry off the sewage turned into it, and at times this was forced through the man-holes and inundated plaintiff's premises, inflicting serious injury. These inundations increased in frequency as new lateral sewers were connected with the main trunk, and became well known to the municipal officers. Notwithstanding this the city continued to build and attach lateral sewers, increasing from year to year the evil produced by the defects in the original plan. In an action to recover damages, *held*, that the city was liable; that having by the exercise of its power created a private nuisance on plaintiff's premises, it incurred a duty of adopting

Statement of case.

such measures as should abate the nuisance, and having the power to perform it, its omission to do so renders it liable.

Mills v. City of B. (32 N. Y. 489), *Smith v. Mayor, etc.* (66 id. 295), *Wilson v. Mayor, etc.* (1 Den. 595), *Lynch v. Mayor, etc.* (76 N. Y. 60), distinguished.

(Argued November 30, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made July 14, 1884, which reversed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial and which granted a new trial.

This action was brought to recover damages alleged to have been caused to plaintiff's premises by defendant's negligence in the construction of a sewer.

The facts are sufficiently stated in the opinion.

John A. Taylor for appellant. The perfecting and consummation of the sewage plan thus committed to a special commission was a matter of public concern, called for by the health and safety of the people at large, in which the commissioners acted *quasi-judicially* and as public agents. (*Maxmillan v. Mayor, etc.*, 62 N. Y. 168; *N. Y. & Brooklyn S. M. Co. v. Brooklyn*, 7 id. 580.) Municipal corporations are in no case liable for errors of judgment committed by subordinate departments as to matters of a judicial nature. (*Wilson v. Mayor, etc.*, 1 Denio, 595; *Governor v. Meredith*, 4 Durnf. & East, 796; *Mills v. City of Brooklyn*, 32 N. Y. 496; *McCarthy v. Syracuse*, 46 id. 196; *Hines v. Lockport*, 50 id. 238; *Kavanagh v. City*, 38 Barb. 232; *Lynch v. Mayor, etc.*, 76 N. Y. 60; *Urquhart v. Odgensburgh*, 91 id. 71; 97 id. 230; *Carr v. Northern Liberties*, 35 Penn. St. 324; *Detroit v. Beekman*, 34 Mich. 125; *Lansing v. Toolan*, 37 id. 152; *Allen v. Chippewa Falls*, 52 Wis. 430; *Darling v. Bangor*, 68 Me. 108; *Flagg v. City of Worcester*, 13 Gray, 601; *City Council v. Gilmer*, 33 Ala. 116; *Daniels v. Denver*, 2 Col. 669; *Denver v. Capelli*, 4 id. 25; *Judge v. Meriden*, 38 Conn. 90; *Magarity*

Statement of case.

v. *Wilmington*, 5 Houst. [Del.] 530; *Bamadan v. District of Columbia*, 2 Mackay, 285; *Rozell v. Anderson*, 91 Ind. 591; *City of Atchinson v. Challis*, 9 Kans. 603; *Van Pelt v. Davenport*, 42 Iowa, 308; *Brewster v. Davenport*, 51 id. 427; *Wicks v. De Witt*, 54 id. 130; *Bennett v. New Orleans*, 14 La. Ann. 120; *Dorley v. Bangor*, 68 Me. 103; *Childs v. Boston*, 4 Allen, 51; *Merrifield v. Worcester*, 110 Mass. 216; *Dermont v. Detroit*, 4 Mich. 435; *Foster v. St. Louis*, 71 Mo. 157; *Weyman v. Jefferson*, 61 id. 55; *Wilson v. Mayor, etc.*, 1 Denio, 595; *Mills v. Brooklyn*, 32 N. Y. 496; *Smith v. Mayor, etc.*, 66 id. 295; *Springfield v. Spence*, 39 Ohio St. 665; *Grant v. Erie*, 69 Penn. St. 420; *Allentown v. Kramer*, 73 id. 406; *Fair v. Philadelphia*, 88 id. 309; *Heth v. Fond du Lac*, Cent. L. J., August 14, 1885.) The city cannot be held for consequential damages. (*Radcliff v. Mayor, etc.*, 4 N. Y. 195.) A municipal corporation is not liable for damage to private property unless the act complained of was without the authority of or against law or was improperly or wantonly executed. (Weeks on *Damnum Absque Injuria*, 21; Dillon on *Mun. Corp.* 1078; Shearm. & Redf. on Neg., § 127.) Plaintiff has no equitable standing in court, for if there was any thing improper in either the plan or construction of the sewer, it was known to him when he built his house, it then having been in operation four or five years. (*Springfield v. Spence*, 39 Ohio, 465.) His voluntary occupation of a low lying lot rendered his tenement servient to the discharge of all waters which fell upon the higher lands. (*Martin v. Riddle*, 26 Penn. St. 415; *Kouffman v. Grismer*, id. 407; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, id. 369; *Frazier v. Brown*, 12 Ohio St. 294.)

William C. De Witt for respondent. A municipality is not liable in a private action for an omission to exercise discretionary functions, nor for an exercise thereof in a partial or limited extent, nor for the style or plan upon which it may construct a public improvement. (*Mills v. Brooklyn*, 32 N. Y. 489; *Urquhart v. Odgensburgh*, 91 id. 69; *Hines v. Lockport*, 50

id. 236.) A municipal corporation has no right to collect the sewage of a large portion of a city and by artificial channels cast it upon lands of another, and for such acts it is liable in damages whether or not they be done in conformity to a plan adopted by its officers, judicially or otherwise. (*Noonan v. Albany*, 79 N. Y. 475; *Byrnes v. Cohoes*, 67 id. 204; *Bartin v. Syracuse*, 36 id. 54; *Rochester W. L. Co. v. Rochester*, 3 id. 466; *Richardson v. Boston*, 19 How. [U. S.] 270; *Perry v. Worcester*, 6 Gray, 544; *Sleight v. Kingston*, 11 Hun, 594; *Bastable v. Syracuse*, 8 id. 586; *Beach v. Elmira*, 22 id. 158; *Ashley v. Port Huron*, 35 Mich. 296; *Seifert v. Brooklyn*, 15 Abb. N. C. 97.)

RUGER, Ch. J. The defendant in this case invokes the principle, exempting municipal corporations from liability for damages, occasioned through the exercise of judicial functions, by its officers, as a defense to the action. The cases on the subject are by no means harmonious and render it difficult to deduce from them any general rule, founded upon principle, which clearly marks the line of distinction, between liability and exemption therefrom. We have, however, been unable to find any case in this State going far enough to sustain the contention of the appellant.

Here certain officers of Brooklyn were constituted by statute commissioners of sewage and drainage, with power to devise and frame, a plan of drainage and sewerage for the whole city, upon a regular system, and upon the adoption of such plan to proceed to construct the drains and sewers, as the public health, convenience or interest should demand, or so much thereof as might be necessary. (Chap. 521, Laws of 1857.) By chapter 136, of the Laws of 1861, the commissioners were further empowered, whenever it became necessary, to construct a drain or sewer in any street or avenue for the purpose of preventing damage to property, or to abate a nuisance, and if the same was not in accordance with any plan already adopted, to construct temporary sewers in certain cases, in a manner to avoid such damages, or abate such nuisance. Under the authority con-

ferred by these acts the commissioners, prior to the year 1868, established a certain drainage district covering a surface of nearly twenty-three hundred acres of land, and embracing within its limits a territory not theretofore drained, over the lands of the plaintiff, situated in the same district, and which contemplated the construction of a main sewer, through certain avenues and streets, into which it was designed that lateral sewers intersecting the whole district should empty, as they should be from time to time thereafter constructed, for the convenience of the people desiring them.

In pursuance of this plan the main sewer referred to, was built in 1868, and subsequent to that date various lateral sewers were from time to time prior to the trial in 1884, constructed and connected with said main sewer. Within a short time after the completion of the main sewer, actual use demonstrated that it had not sufficient capacity to carry off the accumulations of water and matter turned into it, and the result was that at times of heavy rain and melting snow the collected sewage, being obstructed in its flow, was forced through the man-holes and inundated the district in which plaintiff resides, inflicting serious injury to his property.

These inundations commenced nearly ten years previous to the trial and increased in frequency and severity as new lateral sewers were built and connected with the main-trunk, until finally they occurred as often as eight or ten times a year and became well known to the officers of the corporation. Notwithstanding this fact the corporation has continued to build and attach lateral sewers to the main-trunk and increased from year to year the evil produced by the defects of the original plan.

From this review of the facts, it would seem that the case is not brought within the principles decided in the authorities referred to by the appellant. The immunity of a municipal corporation from liability for damages, occasioned to those for whose benefit an improvement is instituted by reason of the insufficiency of the plan adopted, to wholly relieve their wants, or on account of a neglect of the municipality to exercise its

power in making desired improvements and other like circumstances, is quite clearly established by the cases. The liability in such cases has been generally, if not always, predicated upon the duty, which the corporation owed its citizens to exercise the power conferred upon it to build streets, sewers, etc., for the convenience and benefit of its property-owners, and its exemption from liability was based upon the limitations necessarily surrounding the exercise of such power, and the judicial character of the functions employed in performing the duty. The question in *Mills v. Brooklyn* (32 N. Y. 489, 495), as stated by Judge DENIO, was that "the grievance of which the plaintiffs complain is that sufficient sewerage to carry off the surface water from their lot and house has not been provided. A sewer of certain capacity was built, but it was insufficient to carry off all the water which came down in a rain-storm and the plaintiffs' premises were to a certain extent unprotected. Their condition was certainly no worse than it would have been if no sewer at all had been constructed." It was there held that the corporation was not liable. The case of *Smith v. Mayor, etc.* (66 N. Y. 295), related to a sewer of sufficient capacity but which was temporarily obstructed by a deposit of mud and sand of which the corporation had no notice, and an overflow, injuring plaintiff, resulted. It was held that the corporation was liable for negligence alone, and that, could not be predicated, upon the facts established. *McCarthy v. City of Syracuse* (46 N. Y. 194) was a similar case, and the same principle was there established, the city being charged with liability for an injury occurring through its neglect to repair a sewer after a lapse of time warranting the presumption of notice of the defect. In *Wilson v. Mayor, etc.* (1 Denio, 595, 598), the damages were occasioned by surface water naturally falling upon the plaintiff's premises but prevented from flowing off by the changes made, in grading its streets, by the city. It was held to owe no duty to its citizen to furnish drainage for the water naturally collected on his premises, and that no liability resulted from the change in the street grade made under statutory authority. It was further said that the power of the corpora-

tion "to make sewers and drains is clear, but it is not their duty to make every sewer or drain which may be desired by individuals or which a jury might even find to be necessary and proper." *Lynch v. Mayor, etc.* (76 N. Y. 60), was also a case where the natural flow of surface water and drainage was obstructed by the exercise of municipal power in grading, pitching and raising the public streets, and the city was declared free from liability for the damages incidentally occasioned to property in consequence of the obstructed drainage, and its omission to build drains for the convenience of the citizen. Its liability, however, in a case like the present was conceded in the opinion delivered by Judge EARL. In *Hines v. City of Lockport* (50 N. Y. 236), the plaintiff was injured by defects in a public street. It was held that the duty resting upon the corporation of building, opening and grading streets, sidewalks, sewers etc., was judicial, but that after they were constructed the duty of keeping them in repair was ministerial, and from an omission to perform that duty liability arose.) *Urquhart v. Ogdensburgh* (91 N. Y. 67, 71) was also a case of injury arising from a defective sidewalk, and the principle there laid down is in harmony with the cases above considered. We have thus referred to the principal cases cited by the appellant, and find no warrant in them for the doctrine that a municipal corporation, in the exercise of its discretionary or judicial power of determining when, where and how to make improvements, such as streets, sidewalks, sewers, etc., has the right to do so upon a plan, which substantially involves the appropriation by it, of the property of a citizen to the public use.

We entertain no doubt as to the liability of the defendant for the damages occasioned by the defects of the sewer, and think it rests upon principles not conflicting with those announced in any reported case, but substantially in harmony with all of them. Municipal corporations have quite invariably been held liable for damages occasioned by acts, resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another whereby injury to his property had been occasioned. (*Baltimore & Potomac R. R.*

Opinion of the Court, per RUGER, Ch. J.

Co. v. Fifth Baptist Church, 108 U. S. 317.) This principle has been uniformly applied to the act of such corporations in constructing streets, sewers, drains and gutters, whereby the surface water of a large territory, which did not naturally flow in that direction, was gathered into a body and thus precipitated upon the premises of an individual, occasioning damage thereto. (*Byrnes v. City of Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587; also in 72 N. Y. 64; *Noonan v. City of Albany*, 79 id. 470, 475; *Beach v. City of Elmira*, 22 Hun, 158; *Field v. West Orange*, 36 N. J. Eq. 118, 120; S. C. on appeal, 29 Alb. L. J. 397.)

We are also of the opinion that the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continuous, but is remediable by a change of plan, or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper. (Wood's Law of Nuisances, § 752.) While in the present case the corporation was under no original obligation to the plaintiff or other citizens to build a sewer at the time and in the manner it did, yet, having exercised the power to do so and thereby created a private nuisance on his premises, it incurred a duty, having created the necessity for its exercise, and having the power to perform it, of adopting and executing such measures as should abate the nuisance and obviate damage. (*Phinizy v. City of Augusta*, 47 Ga. 260, 263; *Byrnes v. City of Cohoes*, *supra*.)

It is a principle of the fundamental law of the State that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor, and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the

statute, for making such compensation. The immunity which extends to the consequences, following the exercise of judicial or discretionary power, by a municipal body or other functionary, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant. Where, however, the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences. (*Radcliff's Ex'rs v. Mayor, etc.*, 4 N. Y. 195.)

It has been sometimes suggested that the principle illustrated in the maxim, "*salus populi est suprema lex*" may be applied to and will shield the perpetrators, from liability for damages arising through the exercise of such power, by a municipal corporation; but we apprehend that this maxim cannot be thus invoked. (*Wilson v. Mayor, etc.*, 1 Den. 595.) The cases where such a doctrine can be properly applied must, from the very nature of the principle, be confined to circumstances of sudden emergency, threatening disaster, public calamity and precluding a resort to remedies requiring time and deliberation. (Whart. Leg. Max. No. 89; *Mayor, etc., v. Lord*, 17 Wend. 285.) It is suggested in the latter case that even in such an event, under the principles of the Constitution, the public would be liable for the damages inflicted. However this may be, we are quite clear that the theory that a municipal corporation has the right in prosecuting a scheme of improvements, to appropriate without compensation, either designedly or inadvertently, the permanent or occasional occupation of a citizen's property, even though for the public benefit, cannot be supported upon the principle referred to. If the use of such property is required for public purposes, the Constitution points out the way in which it may be acquired, when there

Opinion of the Court, per RUGER, Ch. J.

is no such imminency in the danger apprehended as precludes a resort to the remedy provided, and the only mode by which it can be lawfully taken in such cases, is that afforded by the excuse of the right of eminent domain.

No question arises here over the distinction between actual or constructive damages, for the inundation of an individual's premises, constitutes a trespass rendering the party occasioning the injury liable for the damages caused. (*Scrivner v. Smith*, 100 N. Y. 471; *Cooley on Torts*, 332; *St. Peter v. Denison*, 58 N. Y. 416; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 168; *Eaton v. B. C. & M. R. R.* 51 N. H. 504.)

We are also of the opinion that the cases, holding that corporations acting under the authority of a statute cannot be subjected to a liability for damages arising from the exercise by them of the authority conferred, have no application to the circumstances existing in this case, as those cases are confined to such consequences only, as are the necessary and usual result of the act authorized.

The exercise of the authority conferred upon the commissioners of sewage and drainage did not require the injury to the property of the citizens of Brooklyn, which has been occasioned by the inundation complained of, and it was not the natural or necessary result of a proper exercise of their powers. Those injuries arose solely from the defective manner in which the authority was originally exercised, and the continuance of the wrong after notice of the injury occasioned. In such cases corporations have been uniformly held liable. (*Radcliff's Eas. v. Mayor, etc., supra.* Wood on Nuisances (§ 752) says: "The rule being that no action lies against an individual or corporation for doing that which is authorized by the legislature, so long as the authority is properly exercised and not exceeded, but that liability does attach where the authority is negligently or improperly exercised, and where, by a reasonable exercise of the power given either by statute or the common law, damages might be prevented, it is held that a failure to exercise such power is such negligence as charges them with responsibility for consequent damages." "As to the necessity for a sewer or

Statement of case.

its location or the system or plan of sewerage, the decision of the proper municipal is conclusive, because it is an exercise of a discretion reposed in them by the law, and consequently is not reviewable by the courts; but if in the selection of a location it unnecessarily creates a nuisance to public or private rights, it is responsible therefor." (Citing *Franklin Wharf Co. v. Portland*, 67 Me. 46; *Haskell v. New Bedford*, 108 Mass. 208, and many other cases.) Dillon, on Municipal Corporations (§ 1051), lays down the rule where the injury is occasioned by the plan of the improvement, as distinguished from the mode of carrying the plan into execution, that there is not ordinarily, if ever, any liability; but in that case he says: "There will be a liability if the direct effect of the work, particularly if it be a sewer or a drain, is to collect an increased body of water and to precipitate it on to the adjoining private property to its injury."

It follows from the principles stated that the order of the General Term should be affirmed, and judgment absolute ordered for plaintiff.

All concur.

Order affirmed and judgment accordingly.

REBECCA A. WOLF, Respondent, v. WALTER F. KILPATRICK et al., Impleaded, etc., Appellants.

The defendants who appeal were owners of certain premises in the city of New York which they leased to M., who, under and in accordance with a permit from the city, built vaults under the sidewalk in front thereof, with a coal-hole, which was properly constructed, and in the usual and permitted manner. Through the wrongful act of a stranger, who broke the stone supporting the iron cover of the coal hole, the cover turned when plaintiff stepped upon it and he fell and was injured. In an action to recover damages, it did not appear that the appellants had any knowledge or notice of the defect. *Held*, that they were not liable, and it seems they would not have been liable had they themselves constructed the vaults lawfully and with due prudence and care, and thereafter transferred possession of the premises to a third person without covenant on their part to

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Statement of case.

repair; that if the coal-hole became a nuisance after the stone was broken only the person who created the nuisance, or he who suffered it to continue was responsible, and that a party out of possession and control and who had no knowledge, actual or constructive, of the defect could not be said to have suffered it to continue.

A landlord out of possession is not responsible for an after-occurring nuisance unless in some manner he is in fault for its creation or continuance; the bare ownership will not produce this result.

Clifford v. Dam (81 N. Y. 52), *Anderson v. Dickie* (1 Robt. 238), *Dygart v. Schenck* (23 Wend. 445), *Congreve v. Morgan* (18 N. Y. 84), *Davenport v. Ruckman* (37 id. 568), *Swords v. Edgar* (59 id. 28), distinguished.

(Argued December 8, 1885; decided January 19, 1886.)

APPEAL by defendants, Walter F. and Frank J. Kilpatrick, from a judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made November 9, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for injuries sustained by plaintiff, who, in passing over the sidewalk in front of premises owned by the appellants in the city of New York, stepped upon the cover of a coal-hole opening into vaults under the sidewalk. The stone supporting the cover had been broken, and in consequence the cover turned as plaintiff stepped upon it, and she fell and was injured.

The further material facts are stated in the opinion.

W. F. Mac Ræ for appellants. The coal-hole, having been constructed under license from the city, was not *per se* a nuisance, and responsibility for the injury to plaintiff could not be charged upon the Kilpatricks even as owners, except upon the theory of negligence, and no negligence was imputable to them. (*Ditchett v. Spuyten Duyvil R. R. Co.*, 67 N. Y. 425; *Swords v. Edgar*, 59 id. 35; *Gaudy v. Jubber*, 5 B. & S. 78; *Kirby v. Boylston Mkt Assn.*, 80 Mass. 251; *Menzler v. McCotter*, 87 N. Y. 122; *Ryan v. Wilson*, id. 471.) At common law the occupier and not the landlord is bound, as between himself and the public, so far to keep the premises in repair that they may be safe for the public, and such occupier

Statement of case.

is *prima facie* liable to third persons for damages arising from any defect. (*Payne v. Rogers*, 2 H. Blackst. 350; *Regina v. Watts*, 1 Salk. 357; *Blunt v. Aiken*, 15 Wend. 522; *Moody v. Mayor, etc.*, 43 Barb. 282.) The law has been so modified in this State as to make the landlord also liable in regard to nuisances on the premises, provided that said nuisances existed at the time the landlord parted with the possession of the premises, and that he derives a profit or benefit from the premises, such as receiving rents. (*Roswell v. Prior*, 12 Mod. 635; *Gaudy v. Jubber*, 5 B. & S. 485; *Fish v. Dodge*, 4 Denio, 311; *Anderson v. Dickie*, 1 Rob. 238; *Bellows v. Sackett*, 15 Barb. 96.) If at the time the owner parts with the possession and control of his premises, they are in good condition, he will not be liable for damages resulting from a subsequent defect in the premises while they are in possession of a lessee. (*Ditchett v. Spuyten Duyvil R. R. Co.*, 67 N. Y. 425; *Clancy v. Byrne*, 56 id. 129; Cooley on Torts, 167.)

H. Morrison for respondent. On "the sound and firm set earth" this respondent, as one of the public, had a right to walk, and any defect from its original undisturbed condition renders these appellants liable irrespective of the license of the mayor, etc., and the accompanying easements of coal-hole or slide to the excavated vault beneath. (*Anderson v. Dickie*, 1 Rob. 238; *Dygert v. Schenck*, 23 Wend. 446; *Congreve v. Morgan*, 18 N. Y. 75; *Clifford v. Dam*, 81 id. 52; *Davenport v. Ruckman*, 37 id. 568.) That another person may be in possession, occupation or enjoyment, by the permission of the proprietor of the premises, does not affect the legal consequences of the original wrong to the public of being the owner of premises, which by defect become a dangerous pit-fall in a public highway. (*Storrs v. Utica*, 17 N. Y. 108; *Dalzell v. Md. & Cin. R. R. Co.*, 32 Ind. 45; *Whalen v. Gloucester*, 4 Hun, 25; *Chicago v. Robbins*, 2 Am. L. Reg. [N. S.] 535, 537; *State v. Dover*, 46 N. H. 452; *Rathburn v. Rathburn*, 6 Barb. 98.)

FINCH, J. The defendants who appeal were shown to be the owners of premises which had vaults for the storage of coal extending under the sidewalk. The plaintiff was injured by a defect in the stone supporting the cover of the opening which arose while such premises were in the occupation of one Macpherson and others who were tenants having entire control of the premises. The defect was not one of original construction, but occurred through the act and interference of third persons engaged in building the elevated railway, and who broke the stone supporting the iron cover so that it turned under plaintiff's weight and occasioned the injury. We do not know at what time, prior to the accident, the defendants became owners. The building and the vault were constructed by Macpherson, and if, at the time, the appellants were owners, and responsible for the work actually done, it is still established that the vaults were built under a permit from the city and in accordance with that license. The coal-hole and its cover were safely and properly constructed, and in the usual and permitted manner. The case is not, therefore, within the doctrine of *Clifford v. Dam* (81 N. Y. 52), and the kindred authorities cited by the respondent. In that case no permission or license from the municipality to make the excavation was either pleaded or proved, and the construction of the vaults was an unauthorized wrong and a nuisance, for the consequences of which the owner was responsible irrespective of the question of negligence. There was the same lack of special authority in most of the other cases to which we are referred. (*Anderson v. Dickie*, 1 Robt. 238; *Dygert v. Schenck*, 23 Wend. 445, 446; *Congreve v. Morgan*, 18 N. Y. 75, 84.) Nor is the case one in which the owner or landlord has let the premises when in a defective and dangerous condition (*Davenport v. Ruckman*, 37 N. Y. 568), for the proof establishes no such ground of liability. The evidence does not disclose the precise legal relation existing between the occupants and owners. The former were tenants of some kind, although it does not appear that any rent was reserved or paid to the owners, or that the latter were ever in possession at all. On the contrary, Macpherson testified that

from the time he built the houses, which was in 1857, to the time of the accident he had the care and control of the premises both as owner and occupant. So that the recovery must stand, if at all, upon the sole ground that an owner, who has constructed vaults under the sidewalk lawfully and with due prudence and care, and transferred possession of the premises, if he ever had it, to third persons without covenant on his part to repair, is liable for a defect in the vault covering which afterward occurs through the interference of a stranger, although he may have had neither notice nor knowledge of the defect. The court went so far in the case as to charge that "if the plaintiff sustained injury by reason of the defective condition of said coal-hole and without contributory negligence that said defendants Kilpatrick are liable in damages," to which there was an exception. The court was asked to charge "that notice of the alleged condition of the coal-hole must have been given to the Kilpatricks before they could be held liable as owners, when the possession was in Macpherson;" and that "if Macpherson was in the control and care of said premises, and deriving all the benefit therefrom, he alone is liable to the plaintiff." These requests were refused, and the appellants excepted. The basis on which the case was sent to the jury was still more clearly developed in the course of the charge. After stating the liability of the city as founded upon negligence, and involving notice, actual or constructive, of the alleged defect, the learned court added: "The law is a little more severe with respect to the owners of the premises for whose benefit this hole in the sidewalk has been authorized. It holds them to a stricter liability; a party injured by falling through any coal-hole in the sidewalk is not bound in the case of the owner of the premises to show that the owner had notice that the hole was out of repair. It appears, according to the current of decisions, that the owner of the premises is bound to see that the coal-hole and cover over it affords just as safe a passage to the wayfarer as any other portion of the sidewalk. Therefore, the question with respect to these defendants who are the owners of the property is simply how much they should be re-

quired to pay the plaintiff." The doctrine of the trial court was thus made extremely plain. It went upon the ground that the defect in the vault-stone was a nuisance for which the vault owner was responsible, though out of possession and control, without the least knowledge of the fact, and when the defect was produced by the interference and misconduct of strangers.

It may be that the condition of the coal-hole in the sidewalk became a nuisance, while Macpherson was in possession, and after the stone was broken. (*Swords v. Edgar*, 59 N. Y. 28, 34.) But if so, the party responsible can only be the person who either creates the nuisance, or suffers it to continue. The owners did not create it; that was the wrongful act of strangers. How can it be said that they suffered it to continue and so failed in their duty if they had no knowledge, actual or constructive, of the defect, and were out of possession and control? That can only be true on the theory that every owner of rented property in New York is bound to watch the sidewalks and coal-holes in front of his premises and protect them against unauthorized trespasses, and is bound to know when such a trespass is committed. We are aware of no case which goes so far as that. In *Swords v. Edgar* (*supra*), the premises were a pier upon which the public having business were invited to go, and which became dilapidated whereby injury arose. That condition was denominated a nuisance for which, primarily, the lessee in the actual occupation was liable; and he was held to be so liable independent of any covenant to repair and solely by force of the occupancy. But it was also held that the lessors were liable, and upon the ground that the pier was unsafe when demised, and they took a rent for it in that condition. The whole drift of the opinion shows that the landlord out of possession is not responsible for an after-occurring nuisance unless in some manner he is in fault for its creation or continuance. His bare ownership will not produce that result. It was said in *Clifford v. Dam* (*supra*), that proof of authority from the municipality to build the vault would mitigate the act from an absolute nuisance to an act involving care in the construction and main-

Statement of case.

tenance. In *Clancy v. Byrne* (56 N. Y. 129, 133), it was held that if the premises are in good repair when demised, but afterward become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or the public, unless he has expressly agreed to repair or has renewed the lease after the need of repair has shown itself. In the recent case of *Edwards v. N. Y. & H. R. R. Co.* (98 N. Y. 245, 248) the circumstances under which the landlord may become liable are very fully considered with the declared result that "the responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him." It is quite certain then that the plaintiff in this case was bound to establish some fault of omission or commission on the part of the landlord leading to the injury, and barely showing him to be owner is not enough. There was no fault of commission. That is conceded. There could be no fault of omission unless the landlord was bound to repair the defect, had actual or constructive notice of its existence, or was bound at his peril to discover and remedy it. No such duty rested upon him. It was the tenant's duty to repair the stone; it was his neglect which left it unsafe; and the landlord was not shown to be in any respect in fault. The charge made him liable barely from the fact of ownership, and was erroneous.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

THEODORE V. MASTEN, Respondent, v. ADELAIDE OLCOTT et al.,
Appellants.

In an action of ejectment, to recover possession of a small triangular piece or parcel of land, it appeared that the land in question was, prior to 1806, included in a lot known as "the saw-mill lot," and within the courses

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Statement of case.

and distances as given in the deed of said lot. In that year the owner of said lot and the owner of land adjoining it on the south entered into an arrangement to "square the line" between the lots, by which a line was located cutting off said parcel from the saw-mill lot. A fence was built upon said line which was replaced in 1830 by a heavy stone wall. From the time of the location of the line up to 1873, the land in question was inclosed and occupied as part of plaintiff's lot by him and his predecessors in title and the lot north of the line was known as the "saw-mill lot." In 1873, a partition suit was commenced to which plaintiff was made a party. The defendants' premises sought to be partitioned were described as being part of the lot "known as the saw-mill lot;" following this the courses and distances were given, as in the old deed of said lot. The land sought to be partitioned was sold under the judgment in said action, and defendant J., claiming as tenant of defendant A., the grantee, under said sale, took possession of the parcel in question. The person under whom the plaintiffs in the partition suit claimed was a party to the location of the line; he devised it as the premises "known as the old saw-mill premises." *Held*, that plaintiff was not precluded by the judgment in the partition suit from claiming title to the land in question; that the testator must have intended to devise the premises north of the stone wall; that the words "known as the saw-mill lot," in the description in the partition action, were the controlling descriptive words, and as at the time when the said action was commenced and for more than fifty years prior thereto the lot so known was north of the wall, the judgment and sale in partition did not embrace the land in question.

The description clause in a deed is to be so construed if possible as to carry out the intent of the parties; for this purpose false particulars in the description are to be rejected and less material points subordinated to the more certain and material ones when there is inconsistency between them; thus monuments generally control courses and distances. It was claimed that plaintiff was equitably estopped by statements made by him, at the time he was served with the complaint in the partition suit, to the attorney for the plaintiff therein. It did not appear that these statements were communicated to any of the parties or that it influenced the action of the attorney. *Held*, that the claim was untenable.

Plaintiff bid off the premises on the partition sale for one of the other parties to the action. *Held*, this was not an admission that the premises included the land in question.

A survey was made after the partition sale with a view of ascertaining the location of the premises according to the courses and distances in the deed, and plaintiff pointed out the places where the old monuments were located. *Held*, that this in no way prejudiced his legal rights.

After J. had taken possession he brought an action of trespass in justice's court against plaintiff for the entry of the cattle of the latter upon the land in question, of which his complaint alleged he was in possession. The answer was a denial and an averment of possession in the defend-

Statement of case.

ant in that action for more than twenty years. There was no plea of title, and the evidence on the trial related merely to the question of actual possession at the time of the alleged trespass. J. recovered a judgment. *Held*, that the judgment did not conclude on the point of title and in no way affected it. Also *held*, that as A., the real defendant in interest here, was not a party to the justice's court suit, as a judgment upon the title for or against J. would not have bound her, and as estoppels must be mutual, even if the question of title had been involved in that suit, it did not estop plaintiff here.

It seems that a judgment in ejectment against a tenant at the suit of a stranger does not bind the landlord unless he has been brought in and made a party, in fact or in substance, to the litigation.

The rule that estoppels bind parties and their privies applies only to a privity arising after the event out of which the estoppel arises.

(Argued December 4, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made January 9, 1883, which directed judgment in favor of plaintiff upon a verdict, and denied a motion for a new trial.

This was an action of ejectment, brought to recover possession of a triangular piece of land containing about one acre, situate in Sullivan county.

The answer set up a title to the premises in defendant Adelaide Olcott. On the trial defendants claimed, among other things, that plaintiff was estopped by reason of a judgment in a partition suit, also a justice's court judgment.

The material facts are stated in the head-note and in the opinion.

T. A. Read for appellants. The doctrine of estoppel is applied to promote justice and fair dealing, never to aid a fraudulent purpose. (*Royce v. Watrous*, 73 N. Y. 597; *Lawrence v. Seventh Nat. Bk.*, 54 id. 432.) The judgment in justice's court was a bar to plaintiff's right to maintain this action. He showed no paper title from either the State or a common source. He must show possession for twenty years, and that under a claim of title. (22 N. Y. 170; 72 id. 94; 73 id. 560.) The plaintiff in this action did not appeal from the judgment and

Statement of case.

decision in the justice's court, and not having done so is bound by the determination of the facts there tried. (*Lengen v. Gouverneur*, 1 Johns. Cas. 436; *Smith v. Smith*, 79 N. Y. 634.) It need not appear, by the record of the prior suit, that the particular controversy to be precluded was then necessarily tried and determined; it is sufficient if there might have been judgment in the first action for the cause of action alleged in the second. (*Smith v. Smith*, 79 N. Y. 634.) It is only necessary to show both causes of action are identical or substantially so. (*Perry v. Dickinson*, 85 N. Y. 345; *Jordan v. Van Epps*, id. 427; *Masten v. Olcott*, 24 Hun, 587.) In this action to recover possession of the land, and establish the fact that defendant wrongfully holds, plaintiff must depend upon the strength of his own title, and not upon the weakness of the title of his adversary. (*Lamon v. Cheshire*, 65 N. Y. 130; *Wallace v. Swinton*, 64 id. 188; *Bowers v. Arnoux*, 33 N. Y. Super. 530.) A party against whom a verdict is ordered is upon appeal entitled to have every doubtful fact found in his favor. (*Colgrove v. N. Y. C. & H. R. R. Co.*, 20 N. Y. 492; *Hart v. E. R. Co.*, 3 Alb. L. J. 312; *Scofield v. Hernandez*, 47 N. Y. 313.)

T. F. Bush for respondent. Estoppels are not favored. (*Jackson v. Brinkerhoff*, 3 Johns. Cas. 101.) The affirmative is upon the party asserting an estoppel to prove that the question or matter has been in fact litigated and decided between the same parties or their privies. (*Campbell v. Butts*, 3 N. Y. 173; *Doty v. Brown*, 4 id. 71; *Duckell v. Wiles*, 11 id. 420; *Stowell v. Chamberlain*, 60 id. 272; *Dawley v. Brown*, 79 id. 398; *Ferrett v. Cowenhoven*, 11 Hun, 320; *Kerr v. Hayer*, 35 N. Y. 331; *Patrick v. Shaffer*, 94 id. 423; *Clemens v. Clemens*, 37 id. 59.) Where it appears *prima facie* from the record that the question was litigated, the party against whom the estoppel is urged may show by proof *aliunde* that it was not litigated. (*Royce v. Burt*, 42 Barb. 663; *Doty v. Brown*, 4 N. Y. 75; *Mors v. Osborn*, 64 Barb. 543.) The justice's judgment is not a bar to this action. A judgment is conclu-

Opinion of the Court, per ANDREWS, J.

sive only upon the parties thereto, or their privies, and only in respect to the grounds covered by it and the law and facts necessary to uphold it. (*People v. Johnson*, 38 N. Y. 63; *Campbell v. Consalus*, 25 id. 613; *Woodgate v. Fleet*, 44 id. 1.) The justice's court had no jurisdiction, and could acquire none, over the question of title to the premises. (Code of Pro., §. 58; *Ferrett v. Cowenhoven*, 11 Hun, 320.)

ANDREWS, J. The complaint in the partition suit described the premises sought to be partitioned, as being part of the lot "known as the saw-mill lot," and following this designation, courses and distances were given, and the description concludes, "which said premises are known as the old saw-mill lot." The saw-mill lot, as known and occupied at the time, was separated from the lot on the south, occupied by the plaintiff, by a heavy stone wall, erected in 1820. The premises in controversy comprise about an acre of land in a triangular form, south of, and adjacent to the stone wall, which has been inclosed and occupied as part of the plaintiff's lot by him and his predecessors in title from about the year 1806. In that year, Johanna Masten conveyed to Jacob Masten and others, a lot described in the deed by the same description contained in the complaint in partition, and what was then known as the saw-mill lot, embraced the premises now in controversy. But soon after that conveyance an arrangement was entered into between the Mastens, and the owner of the lot next south of the saw-mill lot, to "square the line" between the lots, by which the line was located where the stone wall was subsequently built. Before the erection of the stone wall, and soon after the arrangement referred to, a wood fence was built on the same line by the owner of the plaintiff's lot. From that time to the commencement of the partition proceedings in 1873, a period of more than sixty years, the respective lots had been occupied according to the line fixed in 1806, and when this action was commenced the stone wall had been for more than fifty years the division fence between the lots. The plaintiff has an unquestionable legal title to the premises in controversy unless he

is concluded from asserting such title by the judgment and sale in the partition action in which he was made a party defendant. It is claimed on the part of the present defendant that as the land in controversy is included within the lines mentioned in the description in the partition proceedings, and was in fact originally a part of the saw-mill lot, the plaintiff if he claimed title thereto was bound to set up his title in the partition action and having failed to do so, the judgment and sale therein is conclusive against any subsequent assertion of such title. This would be true on the assumption that it was adjudged in that action that the premises alleged therein to have been owned in common by the parties, and of which partition was decreed, embraced the part of the original saw-mill lot now in controversy. The parties to a partition suit are bound by the judgment therein whether their interests were rightly stated or not, and an adjudication that they were tenants in common of the land adjudged to be partitioned concludes a party to the action, served with process, although he did not appear, and although his title to a part of the land partitioned was in severalty. This was a fact he was bound to put in issue, and have determined on the trial. (*Jordan v. Van Epps*, 85 N. Y. 427; *Cook v. Allen*, 2 Mass. 462.) It comes, therefore, to the question whether the judgment and sale in the partition action did embrace the part of the original saw-mill lot now claimed by the plaintiff. A survey, according to the metes and bounds and courses and distances in the description includes these premises. But the description by courses and distances is not the whole of the description in the partition proceedings. It begins by declaring that the premises sought to be partitioned are "known as the saw-mill lot." It is clear beyond controversy that the lot known as the saw-mill lot, when the partition action was commenced, and for fifty years prior to that time, was north of the stone wall. The stone wall was the line marked on the ground dividing the two lots. It had been located as the south line of the mill lot by agreement between the owners of the two lots and had been acquiesced in as the true line for all that long period. The conveyances of the

plaintiff's lot from 1815, had bounded it on the north by the saw-mill lot or "Masten's saw-mill lot," and the grantees understood that their grants carried them to the stone wall. Jacob Masten, who died in 1852, and under whose will the plaintiffs in the partition suit claimed was a party to the location of the line in 1806 and he devised the saw-mill lot as the premises "known as the old saw-mill premises." It is apparent that he must have intended the premises north of the stone wall, and that it was these premises which were known to him at that time as the saw-mill premises. The rules for the construction of deeds, established to effectuate the intention of the parties, authorizes the rejection of false particulars in the description of the granted premises, and subordinates the less material facts to the more certain and material ones, where there is inconsistency. (*Brookman v. Kurzman*, 94 N. Y. 272, and cases cited.) Thus monuments generally control courses and distances, because grants are supposed to be made with reference to an actual view of the premises. (*Wendell v. People*, 8 Wend. 183, 190.) It cannot be doubted that the parties to the partition action on reading the description in the complaint, would locate the land by reference to the actual inclosure of the saw-mill property, rather than by the courses and distances, which could only be located by a survey, the monuments mentioned, having been lost or destroyed, and so also as to a purchaser on a partition sale. If the devisees under the will of Jacob Masten had conveyed by the same description contained in the complaint in the partition suit, could the grantee have claimed that the grant was intended to cover the premises in controversy? If a grantee in a voluntary conveyance could not do so a purchaser on a partition sale stands in no better position. We think the words "known as the saw-mill lot," in the description in the partition action were the controlling descriptive words, and that the premises covered by the sale were the saw-mill lot as it was then known bounded on the south by the stone wall. The judgment and sale in that action, therefore, did not conclude the plaintiff from asserting his title to the premises now in controversy.

Opinion of the Court, per ANDREWS, J.

The defendants claim that an equitable estoppel has arisen against the plaintiff, by reason of acts and conduct before, at, and after the sale in partition. The claim cannot, we think, be supported. The interview with the attorney, when the plaintiff was served with the complaint in the partition action, was casual, and what was said, so far as appears, was never communicated by the attorney to any of the other parties, nor did it influence his action. The bidding off of the property on the sale by the plaintiff for one of the other parties to the action, was not an admission that the premises sold embraced the land now in question. The act was commensurate only with the thing to which it related, that is, a sale of the land included in the description, and this, as we have seen, did not embrace any part of the plaintiff's lot. The surveys made after the sale, when the plaintiff was present were made with a view of ascertaining the location of the premises according to the courses and distances in the deed, and his pointing out the places where the old monuments were located did not in any way prejudice his legal rights.

The remaining question arises upon the claim of the defendants that the justice's judgment rendered in December, 1876, in an action for trespass brought by the defendant John Olcott, against the plaintiff, in which Olcott recovered \$5 damages, is a conclusive adjudication against the title now claimed. There are several answers to this point. The action in the justice's court was for the entry of the defendants' cattle upon the land in question, trampling the plaintiff's crops, etc. The complaint alleged possession simply of the *locus in quo* in the then plaintiff and not title. The answer was a denial, and possession in the then defendant for twenty years. There was no plea of title, and the evidence on the trial related solely to the point of actual possession at the time of the alleged trespass, and no evidence was given of twenty years possession by the defendant. Possession was the only point litigated, and the question of legal title was not in any way brought into controversy. It is very plain that the judgment did not conclude on the point of title, or in any way

Opinion of the Court, per ANDREWS, J.

affect it. The question of title was not tried before the justice, and could not be, except perhaps where a plaintiff in an action of trespass in a justice's court should be permitted without objection on the part of the defendant to give evidence of title as the ground of and to support his allegation of possession the defendant not disputing such title, and judgment should pass in favor of the plaintiff, a point, however, as to which we express no opinion. (See *Boyer v. Schofield*, 2 Keyes, 628; *Koon v. Mazuzan*, 6 Hill, 44.) The actual question tried being the possession only, the judgment was an adjudication merely that the actual possession at the time of the alleged trespass was in Olcott, and that for the purposes of that action his possession was lawful and that Masten's cattle were wrongfully on the land. Judgment for Olcott was inevitable under the pleadings as framed, although in law he may have been a trespasser on the premises, and although at the very time of the alleged trespass and of the rendition of the judgment the legal title and the right of possession were conjoined in Masten. The latter by not pleading title had precluded himself from raising the question. He elected thereby to stand or fall in the action upon the question of the actual and naked possession of the land. (*Ehle v. Quackenboss*, 6 Hill, 537.) It is extremely well settled that a judgment is conclusive only as to matters within the jurisdiction of the court by which it was rendered, and only upon such questions as the court had the power to adjudicate in the action. There is another conclusive answer to the alleged estoppel of the justice's judgment as between the present plaintiff and the defendant Adelaide Olcott, the real defendant in interest. John Olcott, the plaintiff in the justice's suit, could not bind her title by a litigation to which she was not a party, and as estoppels must be mutual, a judgment upon the title for or against John Olcott in the trespass suit, would not bind her in the one case, or entitle her to its benefit in the other. A judgment against a tenant in ejectment at a suit of a stranger does not bind the landlord unless the landlord has been brought in and made a party in fact or in substance to the

Statement of case.

litigation. (*Doe v. Challis*, 17 Ad. & El. [N. S.] 166; *Chirac v. Reinecker*, 2 Pet. 613; *Sheridan v. Andrews*, 49 N. Y. 478; *Bennett v. Leach*, 25 Hnn, 178.) This rests upon the broad principle of justice that a person ought not to be bound by the result of a litigation to which he was not a party. The rule that estoppels bind parties and privies is no exception. This applies only to a privy arising after the event out of which the estoppel arises and the person in privy is bound by or entitled to the benefit of the estoppel because he comes in after the fact creating the estoppel by succession or representation to the original title or interest. (*Campbell v. Hall*, 16 N. Y. 575.) The cases of feoffer and feoffee, lessor and lessee, ancestor and heir, are examples. (See 1 Smith's Lead. Cas. 800, n, and cases cited.) The tenancy between John Olcott and Adelaide Olcott originated prior to the rendition of the justice's judgment and within the rule stated the landlord was not entitled to the benefit of the estoppel in favor of the tenant created thereby, assuming that the judgment determined the title as between the parties.

We think the judgment below is right, and it should be affirmed.

All concur, except RUGER, Ch. J., dissenting.

Judgment affirmed.

MICHAEL DENMAN et al., Respondents, v. JOHN MCGUIRE, impleaded, etc., Appellant.

Plaintiffs commenced an action against defendant, McC., by service of summons by publication. An attachment was issued therein, which was levied upon certain lands, and plaintiffs obtained judgment. In an action brought to set aside as fraudulent against creditors, a conveyance of land by McC. to defendant McG., and to have the judgment declared a lien thereon, the latter attacked the attachment proceedings and the judgment. McG. was found guilty of co-operating with McC. to defraud his creditors. *Held*, that the proceedings should be upheld unless absolutely void for jurisdictional defects; and that they should be liberally construed to uphold the judgment, although they might

Statement of case.

have been held insufficient in a direct proceeding by the judgment debtor to set them aside.

Proceedings taken during the twenty days that the Code of Remedial Justice was in force were valid if taken under that Code, or under the Code of Procedure, so far as any action was based upon them prior to September 1, 1877, when the Code of Civil Procedure went into effect.

(Argued December 2, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 3, 1883, which affirmed a judgment in favor of plaintiffs, entered on a decision of the court, on trial at circuit, certain questions of fact therein having been submitted and tried by a jury.

The nature of the action and the material facts are stated in the opinion.

Arthur C. Betts for appellant. The judgment in the action against McCann, he never having been personally served and having never appeared, was *in rem*; all the steps to vest the court with jurisdiction of the subject-matter of the action must be taken as required by law. (*McKinney v. Collins*, 88 N. Y. 216; *Warren v. Tiffany*, 17 How. 106.) Plaintiffs have no standing in court, because their judgment against Felix McCann is void for want of jurisdiction and never had any life or validity against the defendant McCann, and especially against the defendant McGuire. (*Staples v. Fairchild*, 3 N. Y. 41; *Wallace v. Swinton*, 64 id. 188; *McKinney v. Collins*, 88 id. 216; *Towsley v. McDonald*, 32 Barb. 604.) A jurisdictional defect can be raised at any time by any one sought to be affected by any judgment. (*Buck v. Ayers*, 19 Hun, 24; *Bartlett v. Holmes*, 12 id. 398; *Chemung Co. Bk. v. Judson*, 4 Seld. 259; *People v. Soper*, 3 id. 429; *Van Alstyne v. Erwin*, 11 N. Y. 331; *Dobson v. Pearce*, 12 id. 164.) In a case like the one at bar where the defendant is a non-resident and has not been served personally with process, and it is sought to divest him of his property by a proceeding under the statute, the statute must be strictly followed or the judg-

Statement of case.

ment will be a nullity. (*Hallett v. Richters*, 13 How. 43; *Warren v. Tiffany*, 17 id. 106; *Hyatt v. Wagenwright*, 18 id. 248; *Cook v. Farran*, 34 Barb. 95; *Evertson v. Thomas*, 5 How. 45; *Hulbert v. Hope Ins. Co.*, 4 id. 278; *McKinney v. Collins*, 88 N. Y. 216; *Stanton v. Ellis*, 2 Kern. 579; *People v. Board Police*, 6 Abb. 162; *Bloom v. Burdick*, 1 Hill. 130.)

T. F. Bush for respondent. The court having acquired jurisdiction by due service of the summons, and proof by affidavit having been produced on application for judgment showing the issue and levy of the attachment, and an undertaking having been given to indemnify the defendant as required by Rule 34 then in force, the judgment rendered was conclusive as against a stranger to the record. (*Vandee v. Lord*, 2 N. Y. 269; *Hall v. Stryker*, 27 id. 596.) An attachment is a provisional remedy, and any irregularity in granting or executing it is available only to a party to the action on a motion to vacate it. (*Tracy v. First Nat. Bk.*, 37 N. Y. 523; *Hall v. Stryker*, 27 id. 596.) Questions relating to the proceedings under the attachment after it was granted are not jurisdictional in their nature; all such proceedings are amendable if defective, and the statute relating thereto is directory only. (*White v. Bogart*, 73 N. Y. 256; *Wright v. Nostrand*, 94 id. 47; *O'Brien v. Merch. & T. Ins. Co.*, 57 id. 57.) Chapter 318, Laws of 1877, made the Code of Procedure applicable and put out of existence the "Code of Remedial Justice," as effectually as if it had never been passed, except that all proceedings had in conformity to it were not impaired by the suspension. (*Washburn v. Franklin*, 35 Barb. 599.) This legislation being remedial no objection to its retroactive effect can exist. (*Washburn v. Franklin*, 35 Barb. 599.) It having been found on the trial, and it being undisputed, that all the facts existed when the attachment was granted which were necessary to authorize it, a court of equity cannot be required to ignore the facts which are now made clear and deal only with the shadow upon which the judge

Opinion of the Court, per EARL, J.

granting the attachment was required to act. (*Howe Machine Co. v. Pettibone*, 12 Hun, 657; 74 N. Y. 68.)

EARL, J. This action was brought by the plaintiffs, judgment creditors of defendant McCann, to set aside a conveyance of land situated in Sullivan county, made on the 15th day of October, 1874, by McCann, to his son-in-law, the defendant McGuire, and to have their judgment declared a lien on such land.

The plaintiffs attached the land and obtained a judgment against McCann as a non-resident, by the service of summons by publication, and this action is based upon the judgment thus obtained. The affidavit for the attachment was made April 21, 1877, and the undertaking for the same was executed on the same day. The undertaking was approved and warrant of attachment was issued on the 2d day of May. The complaint in the action against McCann was verified April 25; and the summons in that action was dated May 3. The order for the publication of the summons was granted May 8, and the judgment was entered August 21.

The Code of Remedial Justice which was enacted in 1876, took effect May 1, 1877, and was in force until May 22, when its operation was suspended until September 1, 1877, and the Code of Procedure was re-instated until that time. Upon the trial of this action the defendant assailed the attachment proceedings and the judgment for various irregularities and defects, and claimed that they were absolutely void for want of jurisdiction. As the merits of this controversy have been decided against McGuire, and he has been found guilty of co-operating with McCann to defraud his creditors, his technical objections to the proceedings against McCann to which he was an entire stranger, should not be listened to with favor.

In this collateral attack upon them, those proceedings should be upheld unless absolutely void for jurisdictional defects. There seems to have been singular carelessness and inattention in conducting the proceedings, and a court considering a motion made by McCann to set them aside might well hesitate to

uphold them. But in this action they should be liberally construed for the purpose of upholding the judgment against McCann and the judgment now appealed from. We will now notice some of the most material objections separately.

(1.) The attachment was obtained on the ground that McCann had assigned and disposed of his property and departed from the State with intent to defraud his creditors. It is objected that the affidavit made to procure the attachment did not sufficiently state the facts showing the fraudulent intent. While it is not so full as could be desired, yet we think there was enough to confer jurisdiction to issue the attachment.

(2.) It is objected that the affidavit did not state that the plaintiffs were entitled to recover the amount mentioned therein "over and above all counter-claims known to them" as required by section 636 of the Code of Remedial Justice. By section 3 of the Suspending Act (Chap. 318 of the Laws of 1877) it was provided that any proceeding taken in conformity to the Code of Remedial Justice during the twenty-two days of its existence, should not be impaired by the suspension, but that all subsequent proceedings in the action should conform to the Code of Procedure, and that the court should allow without costs any amendment or other proceeding necessary for that purpose. The affidavit was in strict conformity with the Code of Procedure which was in force when it was made, but it did not conform in the respect specified by the objection with the Code of Remedial Justice when it was presented to the judge who granted the attachment. But while the operation of section 636 above referred to was suspended and the prior Code was in force, the provisions of that section could not be invoked against an affidavit which conformed to that Code. The affidavit conformed to the law in force when the judgment was entered in August, 1877. We think the effect of the statutes is that proceedings taken during the twenty-two days were valid if taken under either Code, at least so far as any action was based upon them prior to September 1, 1877 when the present Code took effect.

(3.) It is objected that the affidavits upon which the order

of publication was granted were insufficient to confer jurisdiction, in that they did not show that any effort had been made to serve the summons within this State, or that the plaintiff had used reasonable diligence to ascertain where the defendant would receive matter transmitted through the post-office. We think the affidavits sufficient in these respects. They show that efforts were made to serve the summons upon McCann and to ascertain his place of residence, and that his residence and whereabouts were unknown. The facts sworn to were sufficient to confer jurisdiction.

(4.) It is objected that the notice attached to the summons published did not state where the summons was filed as required by the Code of Remedial Justice (§ 442). The notice was not in the precise form prescribed by that section, but we must hold that it was in substantial compliance therewith. The summons and notice were attached, and the latter referred to the former. In the summons it was stated that the action was in the Supreme Court and triable in Sullivan county, and the notice states that the order was issued by the special county judge of that county, and that the summons was filed with the complaint. As the complaint was required to be filed in the clerk's office of Sullivan county, we think there was sufficient notice that the summons was filed in the same place. This notice was so far deficient and irregular that it might have been held insufficient in a direct proceeding instituted by McCann to set aside the service of the summons and the subsequent proceedings had thereon. But we think it ought to be held sufficient, as against a collateral attack by McGuire, a stranger to that judgment. It was not so defective that the court failed to acquire jurisdiction to give judgment.

(5.) Various other objections are made to the attachment proceedings and to the mode of obtaining the judgment against McCann, but those objections simply point out irregularities and do not present or raise any question of jurisdiction.

(6.) The exception to the charge of the judge to which our attention is called points out no error. The language of the judge was a fair commentary upon the case. He did not

Statement of case.

charge that it was as a rule of law incumbent upon the defendant to procure the evidence of McCann, and he laid down no rule of law in reference thereto. But he distinctly charged that the burden was upon the plaintiffs to establish the fraud which they alleged.

We are, therefore, of opinion that the judgment should be affirmed, with costs.

All concur, except ANDREWS and DANFORTH, JJ., dissenting.
Judgment affirmed.

WILLIAM SCHOLLE, Appellant, v. JACOB SCHOLLE et al., Respondents.

101	167
167	188
167	184
167	186

Where a trustee who has an interest to protect, by bidding at a sale of the trust property, makes special application to the court for permission to bid, which, upon a hearing of all the parties interested, is granted, he can make a purchase which is valid and binding upon all the parties, and under which he can obtain a perfect title.

(Argued December 8, 1885 ; decided January 19, 1886.)

APPEALS from two orders of the General Term of the Superior Court of the city of New York, made November 6, 1885, one of which affirmed an order of Special Term confirming the report of a referee of a sale under the judgment herein, and requiring plaintiff William Scholle and defendant Jacob Scholle to complete the several purchases made by them on the sale ; the other affirmed an order of Special Term which denied a motion on the part of said parties to be released from their said purchases.

This action was for partition. The material facts are stated in the opinion.

Alexander B. Johnson for appellant. Jacob Scholle, being the executor, trustee and guardian under the will of his brother, is incapable of purchasing the trust property. (*Fulton v. Whitney*, 66 N. Y. 548 ; *Davoue v. Fanning*, 2 Johns. Ch. 252 ; *Campbell v. Walker*, 5 Vesey, 678 ; *Ex parte James*,

Statement of case.

8 id. 337; *Randall v. Erington*, 10 id. 423; *Morse v. Royal*, 12 id. 355; *Lowther v. Lowther*, 13 id. 95; *Coles v. Trecothick*, 9 id. 234; *Ex parte Bennett*, 10 id. 385; *Gallalan v. Cunningham*, 8 Cow. 361; *Torrey v. Bank of Orleans*, 9 Paige, 661; *Michoud v. Girod*, 4 How. [U. S.] 553.) Sales of such a nature are void or voidable, without regard as to whether the sale is had under judicial sanction; whether the sale is at public auction, or whether the prices bid are fair and adequate. (*People v. Open Board*, 92 N. Y. 98; *Iddings v. Bruen*, 4 Sandf. Ch. 263; *Ten Eyck v. Craig*, 62 N. Y. 419; *Lytle v. Beveridge*, 58 id. 606; *Gardiner v. Ogden*, 22 id. 327; *Van Epps v. Van Epps*, 9 Paige, 237; *Case v. Carroll*, 35 N. Y. 385; *Forbes v. Halsey*, 26 id. 153; *Whelpdale v. Cookson*, 1 Ves. Sr. 8; *Cumberland C. Co. v. Hoffman*, 30 Barb. 569; 16 Md. 456; *Conger v. Ring*, 11 Barb. 356.)

Ferdinand R. Minrath for respondents Siegman. Ordinarily a purchase by an executor, directly or indirectly, of any part of an estate held by him as such, whether at public auction or private sale, is voidable at the option of the beneficiaries under the will, and these rules can be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has or has not a personal interest in the same property. (*Michoud v. Girod*, 4 How. [U. S.] 503; *Davoue v. Fanning*, 2 Johns. Ch. 251; *Gardiner v. Ogden*, 22 N. Y. 327; *Conger v. Ring*, 11 Barb. 356; *Fulton v. Whitney*, 66 N. Y. 548; 1 Greenlf. Cruise on Real Property, 447; Tiffany and Bullard on Trusts and Trustees, 483; 4 Kent's Com. 438.) Nor is the mere formal leave to buy usually granted to the parties in a foreclosure or partition decree of sale sufficient to legalize such purchase by an executor or trustee, as said consent is granted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action or between such parties and others. (*Fulton v. Whitney*, 66 N. Y. 556; *Torrey v. Bk. of Orleans*, 9 Paige, 661; *Conger v. Ring*, 11 Barb. 356.) Any court having jurisdiction of both trustees

Statement of case.

and *cestui que trustent* and having jurisdiction of the subject-matter may, in a proper case, and after the hearing of such *cestui que trustent* or beneficiaries, authorize such trustees to buy individually at a sale of such trust property, and such leave of a court will effectually bar any rights of said beneficiaries to question or attack such purchase. (*De Caters v. Chaumont*, 3 Paige, 178; *Gallatin v. Cunningham*, 8 Cow. 361; *Campbell v. Walker*, 5 Ves. Jr. 678; *Michoud v. Girod*, 4 How. [U. S.] 503; Potter's Willard's Eq. Jur. 607; Lewin on Law of Trusts [7th ed.], 443; Godefroy on Trusts, 184; *Fulton v. Whitney*, 66 N. Y. 556; 11 Barb. 365; 33 id. 593; 59 id. 13; 21 id. 201; 5 N. Y. 262; 22 id. 349; 27 id. 565; 44 id. 241.)

Samson Lachman for respondents. The court had power to authorize the trustees to bid at the sale in partition. (*Davous v. Fanning*, 2 Johns. Ch. 252; *Fulton v. Whitney*, 66 N. Y. 548; *Van Epps v. Van Epps*, 9 Paige, 237.) An exception exists where the trustees have a personal interest in the property, which would otherwise be seriously prejudiced or where, in the opinion of the court, it would be to the advantage of the *cestui que trust* to grant such leave. (*Campbell v. Walker*, 5 Ves. 678; *Farmer v. Dean*, 32 Beav. 327; *Gallatin v. Cunningham*, 8 Cow. 390; *De Caters v. Chaumont*, 5 Paige, 178; *Fulton v. Whitney*, 66 N. Y. 548; *Bergen v. Bennett*, 1 Caine's Cas. in Error, 20; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Faucett v. Faucett*, 1 Bush [Ky.], 511; *McCarty v. Press Co.*, 5 La. 16; Willis on Trusts [1827], 164; Underhill on Trusts, 228, art. 53, 234; Lewin on Trusts [7th ed.], 443; Hill on Trusts [4th Am. ed.], 159; Perry on Trusts [3d ed.], § 195; Sugd. on Vend. 694 [8th Am. ed. 419]; Dart on Vend. [5th ed.] 44; Willard's Eq. Jur. 607; White and Tudor's Lead. Cas. 212; Tuttle's Farm Titles, East Side, 217.) All parties to the suit, infant or adult, and all unborn children are bound by the orders, judgment and decree in the suit. All were represented, and no step was taken without notice to every party. (Code of Civ. Pro., §§ 1557, 1577.) The

Opinion of the Court, per EARL, J.

decree constitutes an adjudication, which is final and binding upon all the parties. (*Clemens v. Clemens*, 37 N. Y. 73; *Blakely v. Calder*, 15 id. 617; *Brevoort v. Brevoort*, 70 id. 136.)

EARL, J. Prior to March 15, 1880, Abraham Scholle, together with the plaintiff, William Scholle, and the defendant, Jacob Scholle, were seized of certain real estate in the city of New York as equal tenants in common. Abraham Scholle died in March, 1880, leaving a will whereby he appointed his brothers, Jacob and William Scholle, his widow, Babetta, Julius Ephrmann and Simon Davidson executors and trustees, all of whom but William Scholle qualified as such. Davidson was subsequently discharged by order of the Surrogate's Court and the other three acted as sole trustees and executors of the will. The will was also admitted to probate in California, and there William Scholle qualified as executor. By the provisions of the will the testator gave his executors power to sell his real estate, and he directed them to sell the same and invest the proceeds as directed and pay the income thereof to his children during their lives, and at their deaths the share of each parent was to go to his or her children *per stirpes*. The testator left two sons and two daughters, the daughters having infant children living, all of whom were made defendants in this action, and the infants were represented therein by a guardian *ad litem* duly appointed. The action was brought by William Scholle for the partition of all the real estate held in common by him, Jacob and the testator. The action was referred to a referee who reported that a large portion of the property was incapable of partition and would have to be sold; and a judgment in accordance with his report was entered. Thereupon plaintiff and the defendant, Jacob Scholle, presented to the court their petition setting forth their individual interests in the property, and various other facts, and asking for leave to buy at the sale. The petition came on for a hearing before the court on notice to all parties, including the guardian *ad litem* for the infants and all the other beneficiaries under the will, and the matter

was referred to a referee to take testimony and report to the court together with his opinion whether Jacob and William Scholle could with safety be permitted to purchase. The referee after hearing the testimony, and full notice to all parties, reported that Jacob and William Scholle should be permitted to purchase, provided their bids were made subject to confirmation by the court, both as to their adequacy and fairness, and his report was subsequently confirmed by the court on notice to all parties. The property was subsequently exposed for sale by the referee appointed for that purpose, and Jacob and William Scholle were the highest bidders for property amounting in value to about \$200,000. In pursuance of the directions contained in the interlocutory judgment, the same referee summoned all the parties before him, and took evidence as to the adequacy of the bids and prices paid, and after hearing all the parties found that they were adequate, and so reported to the court, and his report was confirmed. Subsequently William and Jacob Scholle made a petition to the court to be relieved from their purchase on the ground that they could not obtain a good title because they were trustees named in the will, and at the same time the referee appointed under the interlocutory judgment to sell the property made a motion to compel them to complete their purchase. Both motions came on before the court at the same time on due notice to all parties interested in the property, including all the beneficiaries, and the court made an order directing William and Jacob Scholle to complete their purchase and denied their application to be relieved therefrom; and they appealed from that order to the General Term and from affirmance there to this court.

The general rule is not disputed that the purchase by a trustee directly or indirectly of any part of a trust estate which he is empowered to sell, as trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has or has not a personal interest in the same property. Nor is it sufficient to enable a trustee to make such a purchase

that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, has been inserted in the judgment. Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others. (*Fulton v. Whitney*, 66 N. Y. 548; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Conger v. Ring*, 11 Barb. 356.) But where the trustee has an interest to protect by bidding at the sale of the trust property, and he makes special application to the court for permission to bid, which, upon the hearing of all the parties interested, is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title. (*De Caters v. Chaumont*, 3 Paige, 178; *Gallatian v. Cunningham*, 8 Cow. 361; *Davoue v. Fanning*, 2 Johns. Ch. 251; *Bergen v. Bennett*, 1 Caine's Cas. 1, 20; *Chapin v. Weed*, 1 Clarke's Ch. 464, 469; *Colgate's Ex'r v. Colgate*, 23 N. J. Eq. 372; *Froneberger v. Lewis*, 79 N. C. 426; *Faucett v. Faucett*, 1 Bush, 511; *Michoud v. Girod*, 4 How. [U. S.] 503; *Campbell v. Walker*, 5 Ves. Jr. 678; *Farmer v. Dean*, 32 Beav. 327; *Potter's Willard's Eq. Jur.* 607; *Lewin on Trusts* [7th ed.], 443; *Godefroy on Trusts*, 184.) Here, upon notice to all the beneficiaries, an order was made allowing these appellants to bid. After they had made their bids and signed the terms of sale, a further hearing was had upon notice to all the parties as to the fairness of the sales and the adequacy of the prices, and the sales were approved and confirmed by the court. Under such circumstances there can be no doubt that these appellants would get a good and perfect title to the lands purchased by them, and their title would be good, not only as against all the living parties to the suit, but as against unborn grandchildren, if any such should hereafter come into being. (Code of Civ. Pro., §§ 1557, 1577.)

The orders appealed from should, therefore, be affirmed, with costs.

All concur.

Orders affirmed.

Statement of case.

THE ONEIDA COUNTY BANK, Respondent, v. AMOS BONNEY et al., Appellants.

101	178
138	218

Where an action was commenced in a State court upon a joint contract by service upon one of the joint contractors, and was upon his motion removed into the U. S. Circuit Court, and a second action was commenced in a State court upon the same contract, by service upon another of the joint contractors,—*Held*, that the pendency of the former action was not a good ground for setting aside the summons in the second action.

It seems that a former action in a court of the United States or of another State is no stay or bar to a suit upon the same cause of action in this State; while a recovery in one may be pleaded to the further continuance of the other, until this is obtained both may proceed to judgment and execution, when a satisfaction of one will require a discharge of the other.

(Argued December 8, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made September 15, 1885, which reversed an order of Special Term which vacated and set aside the service of summons herein on defendant Otis and dismissed the action.

This action was upon two drafts drawn upon and accepted by defendants' firm and discounted by plaintiff. The summons was served upon defendant Otis, who moved to set aside the service of the summons upon the ground that an action had previously been commenced on the same causes of action by service of summons on defendant Arthur S. Herenden, upon whose motion it was removed into the United States Circuit Court, where it is still pending.

James S. Sherman for appellants. When the liability is joint all claim is merged in the judgment, whether one or all the defendants are served, and judgment against one is a bar as to all. (*Benson v. Paine*, 9 Abb. 28; *Robertson v. Smith*, 10 Johns. 459; *Mason v. Eldridge*, 6 Wall. 231.) No action against a defendant not originally served can be brought until

Opinion of the Court, per DANFORTH, J.

judgment has been entered and execution returned unsatisfied out of joint property. (Code of Civ. Pro., §§ 1932-7, 1946.) Where the liability is joint only and the action is brought against all, but only one is served, the claim is merged in the judgment, and the judgment is a bar to an action against the other defendants. (*Benson v. Paine*, 9 Abb. 208; *Streatfield v. Halliday*, 9 Durnf. & East, 372.) Where it is brought against all, the action can be prosecuted to judgment, if one only is served. The Code of Procedure provides how this judgment can be enforced out of individual property where joint property fails. (Code of Pro., §§ 1932-7.) The filing of the petition for removal, and the giving of the bond, brings to an end the jurisdiction of the State court, and all future proceedings therein are *coram non judice* and void. (*Stephens v. P. Ins. Co.*, 41 N. Y. 149; *Vandervoort v. Palmer*, 4 Duez, 677.)

Nicholas E. Kernan for respondent. The pendency of a similar action in the United States court is never a bar to an action in the State court. To this position there is no answer. (*Browne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 id. 99; *Burrows v. Miller*, 5 How. 51; *Cook v. Litchfield*, 5 Sandf. Sup. Ct. 330.) The Code provisions are cumulative and do not prevent the maintenance of a new and separate action. (*Lane v. Salter*, 51 N. Y. 1; *Morey v. Tracy*, 92 id. 581; *Ticknor v. Kennedy*, 4 Abb. Pr. [N. S.] 417; *Mason v. Eldred*, 6 Wall. 239; *Oakley v. Aspinwall*, 4 Comst. 512; Code, §§ 1932-1937.) Since the process herein is the same in form as in the first action there is no reason why this action should not be deemed a continuance of the suit in the State court against the other defendant, Otis. (*Wormser v. Dalham*, 57 How. Pr. 286; *N. J. Zinc Co. v. Dahlman*, 7 Rep. 740; *Girardy v. Moore*, 4 Am. L. Rep. [N. S.] 387; 22 Int. Rev. Rec. 394.)

DANFORTH, J. The question upon this record, stated most favorably to the appellant, is whether the pendency of an action upon contract in the United States Circuit Court is

Opinion of the Court, per DANFORTH, J.

good ground for setting aside the service of a summons issued in a court of this State to enforce the same cause of action. As to it the courts below have differed. We agree with the General Term. At common law the pendency of another suit for the same cause could, at most, only be pleaded in abatement; but where the former action is in a court of the United States, or a sister State, it is no stay or bar to a suit in the courts of this State. A recovery in one might be pleaded to the further continuance of the other, but until that was obtained each might proceed to judgment and execution, when a satisfaction of either would require a discharge of both (*Walsh & Gallagher v. Durkin*, 12 Johns. 99; *Mitchell v. Bunch*, 2 Paige, 606, 620), and the rule is the same since the Code. (*Burrows v. Miller*, 5 How. Pr. 51; *Cook v. Litchfield*, 5 Sandf. 330.)

That the first action was commenced in a State court by service upon one of several joint contractors, and removed by him into the United States court, and the second action afterward commenced by the service of a summons upon a different defendant cannot relieve that defendant. The plaintiff is entitled to all the remedies provided by law for the collection of its debt, and need not be satisfied until it has had such a judgment as will bind the defendants individually as well as jointly. It might, perhaps, proceed in the same suit against the other defendants (U. S. Rev. Stat., § 639, 2d subd.), in the State court, or, after judgment against all in such form as would bind the joint property, take proceedings to charge the defendants not personally summoned. It was not bound to do either, but might, as in this instance, commence a new action. (*Lane v. Salter*, 51 N. Y. 1; *Morey v. Tracey*, 92 id. 581.)

We think the order appealed from should be affirmed.

All concur.

Order affirmed.

101	176
165	445
101	176
168	108
101	176
172	578

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK,
Respondent, v. JAMES F. SHEEHAN, Impleaded, etc., Appel-
lant.

The Code of Civil Procedure (§§ 870, 876) authorizes the granting of an order, before an action has actually commenced in a court of record, for the examination of a person against whom such an action is "about to be brought," upon the application of the person who is about to bring the action.

The granting of such an order is within the discretion of the court, and it seems the cases are rare where justice will be promoted by granting it.

(Argued December 8, 1885 ; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made the first Monday of May, 1885, which modified, and affirmed as modified an order of Special Term adjudging the appellant guilty of contempt in disobeying an order requiring him to appear before a referee named to be examined and make a deposition as an expected party to an action about to be commenced in the Supreme Court. The appellant appeared before the referee, but refused to be examined.

M. J. Scanlan for appellant. The order is appealable. (*Brinkley v. Brinkley*, 47 N. Y. 40 ; *Ludlow v. Knox*, 4 Abb. Ct. App. Dec. 326 ; *People v. Dwyer*, 90 N. Y. 402.) In order to render a party liable for contempt in disobeying an order of the court or of a judge, it must appear that it was a lawful mandate. (Code of Civ. Pro., § 14 ; *People v. Riley*, 25 Hun, 587 ; *O'Gara v. Kearney*, 77 N. Y. 423 ; *People v. Edson*, 52 Sup. Ct. 53 ; *In re Fisk*, 7 Civ. Pro. [Brown] 169.) Before a party can be imprisoned for contempt, a reasonably clear case upon the law and the facts should be made, and there should be an adjudication that the alleged misconduct defeated, impaired, impeded or prejudiced a right or remedy of a party to a civil action. (*Fischer v. Raab*, 81 N. Y. 235.) The

Opinion of the Court, per ANDREWS, J.

right of a party to the examination of his adversary is strictly statutory. The court has no inherent or common-law power to order the examination. The statute points out how the examination is to be procured, and that mode must be followed. (*Hershon v. Knickerbocker L. I. Co.*, 77 N. Y. 278.) The order for examination was void because no action had been commenced. (Code, § 870; *Paulmier v. Sweeney*, 56 How. 1; 5 Abb. N. C. 151; *De Leon v. De Lima*, 66 How. 287; *Matter of Paulmier*, 5 Abb. N. C. 151; 3 R. S., chap. 7, title 3, art. 1, § 1; Code of Pro., § 390.) The appearance of an attorney on the application for the order for examination was not sufficient to give the court jurisdiction. (*Couch v. Mulhane*, 63 How. 79; *Brandon Mfg. Co. v. Pettingill*, 2 Abb. N. C. 162.)

G. Zabriskie for respondent. The justice who granted the order for appellant's examination had jurisdiction of the subject-matter and of the person of the appellant, and the order was in all respects regular and cannot be questioned by the appellant in proceedings to punish him for contempt in disobeying it. (*Hunt v. Hunt*, 72 N. Y. 217; *Fisher v. Hepburn*, 98 id. 41; *Clapp v. Graves*, 26 id. 418; *Erie Ry. Co. v. Ramsey*, 45 id. 637; *Higgins v. Rockwell*, 2 Duer, 650; *Cooley v. Lawrence*, 5 id. 605; Code of Civ. Pro., § 424.) There is no force in the objection that under the Code you can examine only "a person who expects to be a party to an action about to be brought," and not a person whom you expect to make a party. (Code, § 872, subds. 1, 6, §§ 873, 875, 881; Code of Civ. Pro., § 877.)

ANDREWS, J. The question on this appeal depends upon the construction of section 870 of the Code, which is as follows: "The deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court, etc., may be taken at his own instance or at the instance of an adverse party, or of a co-plaintiff or co-defendant, at any time

before the trial, as prescribed in this section." The question presented is whether this section authorizes an order for the examination of a person against whom an action is about to be brought, upon the application of the person who is about to bring such action, but before it has been actually commenced. The section is obscure, and its interpretation is by no means clear. The deposition to be taken is of the person "who expects to be a party." A person who contemplates bringing an action expects to be a party thereto, and it seems to be clear that under the section he can procure his own testimony to be perpetuated. The person against whom the action is to be brought, may expect to be sued. A suit may have been threatened, or he may know that a cause of action has accrued against him, or that a liability is claimed, likely to result in litigation. Is the remedy given by this section available to either of the persons so situated, and may an order be granted before suit brought, upon the application of either, for the examination of his adversary? Considering this section alone, the most natural meaning would seem to be that a person who expects to become, or to be made a party to an action, may on his own application have his deposition taken in anticipation of the actual commencement of the suit, and that the words "or at the instance of an adverse party," only apply when the person seeking the examination of his adversary, is a party to a pending action. The change of phraseology by the substitution of the word *party* in the second clause, for the word *person* in the first clause, gives some force to this construction. But section 876 seems to render it clear that a proceeding under section 870 may be instituted by an adverse party against the other, although no suit has been commenced, but is only contemplated. That section provides that certain specified sections for the punishment of contumacious witnesses, shall apply "to the examination of a party, or a person expected to be an adverse party." It would be absurd to provide for the punishment of a person who sought to perpetuate his own testimony. The section plainly was intended to provide for the case of a contumacious witness, ex-

Statement of case.

pected to be made a party to an action, whose examination was sought by his adversary. On the whole we are of opinion that the order issued in this case, on the application of the bank, for the examination of Sheehan, against whom the bank was about to commence an action, was authorized and that he was in contempt for disobeying it. The bank might have commenced its action, and then have procured an order for the examination of the defendant. The granting of an order in such a case as this, before suit brought, upon the application of the proposed plaintiff, is within the discretion of the court, but it can rarely happen that justice will be promoted by granting an order on the application of a proposed plaintiff, before the commencement of an action, and the practice, unless carefully guarded, may lead to great abuses.

The order should be affirmed.

All concur.

Order affirmed.

ANDREW H. HAMMOND, Respondent, v. JAMES MORGAN, Appellant.

101	179
109	11
101	179
126	636

It seems that a judgment for plaintiff in replevin may be entered although the jury has not assessed any damages or found the value of the property; the judgment, however, can only be enforced by execution, not by punishment for contempt. (Code of Civ. Pro., §§ 1780, 1781.)

It seems that the proper mode of trial of an action in equity is before the court without a jury, unless at the instance of the court or a party, some one or all of the issues are ordered to be tried before a jury, and for that purpose the questions by the jury should be distinctly framed.

If the facts so determined with those admitted by the pleadings cover the whole case, motion may at once be made for judgment upon which both parties have a right to be heard. The court may order judgment upon the case as so made, or it may set aside the findings of the jury, or use some of them, and it may allow either party to give further evidence.

If motion for judgment be not at once made, it must be brought on upon motion.

If the findings and admissions do not cover the whole case, the action must be regularly brought to a hearing before the court, which may

Statement of case.

adopt or reject the findings of the jury, and receive proof of other facts, and in such case the court must make findings of fact and law. (Code of Civ. Pro., §§ 968-972, 1225.)

Plaintiff's complaint alleged in substance that he delivered to defendant, to be held by him in trust for plaintiff, an assignment of certain letters-patent, etc., executed to plaintiff by defendant and others, also a release from certain obligations and contracts, which papers defendant refused to deliver upon demand. Judgment was prayed directing defendant to return the papers and for damages because of the detention. The action was put by the plaintiff upon the Special Term calendar, but was stricken therefrom on motion of defendant on the ground that it was an action at law. It was then noticed by plaintiff for trial and was tried at a jury term. The jury rendered a verdict finding the title of the property in the plaintiff and that he should have the return thereof. Plaintiff thereafter on application *ex parte* to the judge who presided at the trial, obtained an order directing judgment ordering defendant forthwith to deliver to plaintiff the instruments so detained, and thereupon judgment was entered as directed. On motion to set aside the order and judgment, *held*, that considering the action, either as one in replevin or as an equitable one, the order and judgment were irregular and unauthorized; that defendant did not have a remedy by appeal from the judgment, his only remedy was by motion.

It seems that where from the nature of the case or of property unlawfully detained, an action in trover or replevin will not give a proper or sufficient relief an equitable action may be instituted for the specific delivery of the property, judgment in which may be enforced by punishment for contempt, but in such case the facts conferring equity jurisdiction must be alleged and proved.

(Argued December 8, 1885 : decided January 19, 1886.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made May 15, 1885, which affirmed an order of Special Term, to set aside a judgment herein in favor of plaintiff and the order upon which it was entered as irregular and unauthorized.

The nature of the action and the material facts are stated in the opinion.

A. J. Vanderpool for appellant. An action at law is still triable by a jury while one in equity is triable by the court. Damages are given in the former, specific relief in the latter. (*Reubens v. Joil*, 13 N. Y. 488.) The facts to entitle a party

Statement of case.

to specific relief must, under the Code, be the same as entitled him to specific relief formerly. (*Coles v. Reynolds*, 18 N. Y. 74.) The answer interposed clearly raised an issue of fact, and whether it should have been tried by the court or jury depended upon the nature of the action. (Code of Civ. Pro., §§ 968, 969.) The entry of the order of judgment and decree in a common-law action was irregular. (*Wylie v. Speyer*, 62 How. Pr. 107; Code of Civ. Pro., § 1237.) The verdict of the jury, since the chattel was never replevined, should have found its value at the time of the trial. (Code of Civ. Pro., § 1726.) The judgment should have been in the alternative and awarded to plaintiff the sum fixed as the value of the chattel to be paid by the defendant if possession thereof was not delivered to the plaintiff. (Code of Civ. Pro., § 1730.) If the action be one in equity, as now claimed by the plaintiff, in the nature of specific performance, the issues raised by the pleadings were triable by the court, unless a reference or jury trial was directed. (Code of Civ. Pro., §§ 969, 970, 971.) After the issues of fact directed to be tried by a jury have been distinctly and plainly stated for trial accordingly, and the jury has rendered its verdict, judgment may be taken upon the application of either party. (Code of Civ. Pro., § 1225.) The decision of the court should have been filed in the clerk's office and should have stated separately the facts found and the conclusions of law. (Code of Civ. Pro., §§ 1010, 1022.) The question of the irregularity of the judgment was properly raised by motion to set it aside. (*Schultz v. Hoagland*, 9 Weekly Dig. 319.) By appealing from the judgment only errors committed on the trial could have been raised. (Code of Civ. Pro., § 999.) A motion for a new trial, upon the judge's minutes, is made upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence. (Code of Civ. Pro., § 999.)

Marshall P. Stafford for respondent. The appeals should be dismissed. The orders are not appealable. (*Harris v. Brown*, 93 N. Y. 390; *Robbins v. Ferris*, 5 Hun, 286; *Noble*

Statement of case.

v. *Prescott*, 4 E. D. Smith, 140; *Peel v. Elliott*, 16 How. 483; *N. Y. Ice Co. v. N. W. Ins. Co.* 23 N. Y. 357; *Foot v. Lathrop*, 41 id. 358; *Schaettler v. Gardineer*, 47 id. 406; *McLean v. Stewart*, 14 Hun, 472.) The cause of action stated in the complaint is one in which the trial court had power to decree specific performance. (Story's Eq. Jur., §§ 703, 709; *Johnson v. Brooks*, 93 N. Y. 337; *Jackson v. Butler*, 2 Atk. 306.) The action was brought in equity for specific performance, and not at law, in replevin. (*Rodgers v. Rodgers*, 11 Barb. 395; *Spalding v. Spalding*, 3 How. 297; *Dows v. Green*, id. 377.) When this court is called upon to review or take into consideration deliberate and formal proceedings had at special and trial terms of the court below, it requires an official record made by that court itself, in the way prescribed by the Code and rules of practice, setting forth what its proceedings were, what it did and decided, and what was the basis and reason for its acts. Affidavits of attorneys giving their version of these particulars are not an authorized or reliable source of information upon such matters and cannot be considered. (*People v. Kelly*, 94 N. Y. 526; *Briggs v. Waldron*, 83 id. 582; *Dow v. Darragh*, 92 id. 537; *Scott v. Morgan*, 94 id. 508; *Laning v. N. Y. C. R. R. Co.*, 49 id. 539; *Grant v. Morse*, 22 id. 324; *Union Bk. v. Kupper*, 63 id. 618.) The fact that a decree for specific performance was entered raises the presumption that the course of the trial was such as to make that the appropriate judgment. (*Grant v. Morse*, 22 N. Y. 325; *Appleby v. Erie Co. S. Bk.*, 62 id. 18; *Briant v. Trimmer*, 47 id. 96; *Standard O. Co. v. Triumph I. Co.*, 64 id. 85; *Fisher v. Hepburn*, 48 id. 55; *Lewis v. Jones*, 13 Abb. 427; *Tracy v. Altmeyer*, 46 N. Y. 598; *Cushman v. Brundrett*, 50 id. 296.) The Code expressly authorizes the employment of a jury in the trial of an equity suit either upon the application of a party or on its own motion. (*Wright v. Nostrand*, 94 N. Y. 41; *Carroll v. Deimel*, 95 id. 255.) The order and judgment are themselves evidence of the facts recited in them. (*Agricultural I. Co. v. Barnard*, 96 N. Y. 532; *Wright v. Nostrand*, 94 id. 31.) When the case finally

Statement of case.

came up for trial, it was entirely in the discretion of the trial judge to decide how the case should be tried. (Code of Civ. Pro., § 967.) The court is not bound by the verdict of the jury in an equity suit. It may adopt the verdict in whole or in part, or it may disregard it entirely, find the facts exactly the opposite of what the jury finds them, and render judgment accordingly. (*Learned v. Tillotson*, 97 N. Y. 6; *Carroll v. Deimel*, 95 id. 255.) The appellant was bound to state the grounds of his motion and he must stand or fall by those he has named. (Rule 87; *Gurnee v. Hoxie*, 29 Barb. 547; *Seelover v. Forbes*, 22 How. 477; *Dewes v. Graham*, 16 Abb. 126; *McKeon v. See*, 51 N. Y. 300; *Harder v. Harder*, 26 Barb. 409; *People v. Stevens*, 1 How. 241; *Roche v. Ward*, 7 id. 416; *Craig v. Fanning*, 6 id. 336; *Lillis v. Sherman*, 39 id. 288; *McLean v. Stewart*, 14 Hun, 472; *Hoteling v. Marsh*, 14 Abb. 161.) The appellant is estopped from claiming that a decree for specific performance was not the proper judgment to enter as the result of the trial. (*Jencks v. Smith*, 1 N. Y. 92; *Manning v. Port H. I. Co.*, 91 id. 666; *Wright v. Cabot*, 89 id. 570; *Thayer v. Marsh*, 75 id. 342; *Salisbury v. Howe*, 87 id. 128; *Fitch v. Russell* 48 id. 672; *Wilson v. Roche*, 53 id. 642; *Davy v. Schaeffer*, 55 id. 446; *Forrest v. Havens*, 38 id. 463; *Bidwell v. Astor M. I. Co.*, 16 id. 263; *Hazard v. Spears*, 3 Keyes, 469.) There is no irregularity in the judgment entered. (*Marble v. Lewis*, 53 Barb. 437; Code of Civ. Pro., § 1228; *Clapp v. Hawley*, 96 N. Y. 614; *Dwight v. Enos*, 9 id. 470; *Kennedy v. Apgar*, 93 id. 539; *Ingersoll v. Bostwick*, 22 id. 425.) The order for judgment is not reviewable in this court. (*Clark v. Hall*, 7 Paige, 382; *Smith v. Rathbun*, 88 N. Y. 666; *Van Slyke v. Hyatt*, 46 id. 262; *Buck v. Remsen*, 34 id. 385; *Whitney v. Townsend*, 67 id. 40; *Lawrence v. Farley*, 73 id. 187; *Cushman v. Brundrett*, 50 id. 296; *Howell v. Mills*, 53 id. 322.) If the order for judgment were reviewable, it could be reviewed only by appeal from the judgment. (*Smith v. Rathbun*, 88 N. Y. 666; *Smith v. Wylie*, 4 Rob. 641.)

Opinion of the Court, per EARL, J.

EARL, J. The plaintiff in his complaint alleges that on the 13th day of May, 1882, he delivered to the defendant a certain written assignment dated in the month of April of that year, and executed by the defendant and Jane Matthews as executors of Mason J. Matthews, deceased, whereby they conveyed to him all the interest of the deceased in certain letters-patent and licenses under an assignment of letters-patent, and also all the interest in any claim which the defendant and Jane Matthews, either by themselves or as executors, or jointly with the defendant and John Nichol had or might have against the Mechanical Orguenette Company of New York, or against any other parties relating to or growing out of the manufacture and sale of mechanical musical instruments; that the assignment was delivered to the defendant in trust to be returned to the plaintiff, but that the defendant failed and refused to return the same, although due demand therefor was made; and further, that in or about the month of March, 1882, a paper in the nature of a release was executed by the firm of Needham & Son to the plaintiff whereby the plaintiff was wholly released from certain obligations, dues and contracts to and with the firm, of which release the defendant obtained possession and still retained possession without right thereto and in violation of plaintiff's right to the possession thereof, although demand for delivery to the plaintiff had been made of defendant and refused; that the assignment and release were of great value to the plaintiff, and that the retention thereof by defendant had greatly damaged him. And judgment was prayed that the defendant be ordered to return the assignment and release and deliver them to the plaintiff, and that the plaintiff have such damage for the detention thereof as a reference for that purpose might show that the plaintiff had suffered, besides costs of the action. The answer denied all the allegations of the complaint except that the papers mentioned therein had been demanded by the plaintiff. The action was subsequently by the plaintiff put upon the Special Term calendar for trial, and was stricken therefrom on motion of defendant's attorney, on the ground that it was at law and

Opinion of the Court, per EARL, J.

not triable there. The plaintiff then noticed the action for trial at a jury term of the court and it was brought to trial, and appears to have been tried as an action of replevin. The jury rendered "a verdict for the plaintiff and found the title of the property in the plaintiff and that he should have the return thereof." Four days after the rendition of the verdict, the plaintiff applied to the judge who presided at the trial, *ex parte*, without any notice whatever to the defendant, and obtained from him an order which directed that the plaintiff have judgment against the defendant ordering him to deliver forthwith to the plaintiff the two instruments mentioned in the complaint, and particularly described in the order, and that plaintiff have judgment against the defendant for costs to be taxed, and that he have execution therefor. Thereupon, on the same day, without any notice to the defendant, the plaintiff entered judgment in pursuance of that order, wherein it was adjudged and decreed that the defendant deliver forthwith to the plaintiff the two instruments mentioned in the complaint, and that the plaintiff have judgment against the defendant for costs of the action which had been adjusted at \$210.92, and that he have execution therefor. A motion was subsequently made by the defendant, among other things, to strike the costs from the judgment, before the same judge who tried the action, and he, seeming yet to treat the action as one in replevin, struck the costs from the judgment on the ground that the jury had not found any value to the property nor any damages for the detention thereof, and that, therefore, there was no basis for an allowance of costs under subdivision 2 of section 3223 of the Code of Procedure. The defendant subsequently by permission of the court made a motion to set aside the order and judgment as irregular and unauthorized, which motion was denied at the Special Term. He then appealed to the General Term and from affirmance there to this court.

From the form of the complaint it is not certain whether the action is at law to recover the possession of the written instruments mentioned in the complaint or in equity to compel

the defendant to specifically perform by delivering the instruments to the plaintiff. It does not seem to be disputed that if the action was one in replevin the judgment is irregular, because it is not such as is prescribed in the Code. A judgment in replevin should award the property to the plaintiff, together with damages for its detention, and, in case delivery of the property cannot be made, its value as determined by the jury in lieu thereof; and the judgment must be enforced by execution and not by punishment for contempt. (Code, §§ 1730, 1731.) A judgment in replevin may undoubtedly be entered, although the jury has not assessed any damages or found the value of the property. In that case the judgment would simply award the property to the plaintiff, to be enforced by execution, and if the return of the property could not be thus obtained, the judgment would be unavailing.

But here the property was not replevied, and it is not now claimed by the counsel for the respondent that the action is to be treated as one at law for the recovery of chattels.

If, on the other hand, this is to be treated as an action in equity to compel specific performance on the part of the defendant, as now claimed on behalf of the plaintiff, then the judgment was wholly unauthorized and the practice quite irregular. In that event the case was properly noticed at the Special Term and should there have been tried before the judge without a jury, unless at his instance or upon the motion of one of the parties some or all the issues were ordered to be tried before a jury; and for that purpose the questions to be answered by them should have been distinctly framed. In such case the issues are sent to a jury for the aid and information of the court. If the questions thus submitted to and answered by the jury, together with facts admitted by the pleadings, cover the whole case, so that no further facts need be proved for the information of the court, motion may at once be made for judgment. Upon such motion both parties have a right to be heard, and the court may order judgment upon the case as then made, or it may set aside the findings of the jury, or use some of them, and it may allow either party to give

Opinion of the Court, per EARL, J.

further evidence. So if the motion for judgment be not at once made, it must be brought on upon motion so that both parties may be heard. But if the findings of the jury together with the facts admitted in the pleadings do not cover the whole case, and other issues remain to be tried, or other facts requisite for equitable relief remain to be proved, then the case must be regularly brought to a hearing before the court, when it may or may not adopt the findings of the jury, and other facts may be proved, and in such case the court must make findings of fact and law to which exceptions may be taken by either party desiring to appeal. Such is the general scheme of practice prescribed by the Code, and in this case there was no semblance of compliance with it. (Code, §§ 968, 969, 971, 972, 1225.)

Here there was no order sending issues for trial to the jury, and no questions or issues were framed; no proof was subsequently taken before the court, and no notice was given to defendants' attorney of the application for the order and judgment.

But if we assume that the verdict of the jury may stand, as no objection was made to the mode of trial or to the verdict, then what did it determine? Simply that the plaintiff owned the instruments and that the defendants wrongfully detained them. These findings, so far as they went, were ample for an action of replevin, but were they, without more, sufficient for the equitable relief awarded? The ordinary remedies of a party against one who has wrongfully converted and wrongfully detains his chattels or choses in action is by an action of trover or replevin. But in peculiar cases, where from the nature of the case or of the property detained, neither of such actions will give proper or sufficient relief, an equitable action may be instituted for the specific delivery of the property, and judgment in such an action may be enforced by punishment for contempt. But before the equitable relief can be granted, the facts conferring equity jurisdiction should be alleged and must be proved. (Pomeroy's Eq. Jur., §§ 177, 1402.)

Here, after the rendition of the verdict, the court could have taken further proof, if necessary, and could thus, after

Statement of case.

hearing the parties, have given judgment based upon its findings of fact and law, including the findings of the jury.

We think, therefore, that the order for judgment and the judgment should be set aside, and then the case will stand where it stood after the verdict, and if the court shall then treat this as an equitable action, it may hear the parties, and if further proof be offered or needed, can take it and then render the proper judgment.

We do not determine whether this should be treated as an action at law or in equity. We leave such determination to the court below. All we now determine is, that the order and judgment should not have been made without notice to and hearing of the defendant, and probably without further proof and findings of fact and law by the judge. The defendant did not have a remedy for the error or irregularity he complains of by an appeal from the order or judgment. His only remedy was by motion.

The orders of the General and Special Terms should be reversed and the order and judgment should be vacated, and the case remitted to the Special Term of the court below for further action therein; and the defendant should have costs of the appeal to the General Term and to this court, and \$10 costs of motion.

All concur.

Ordered accordingly.

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In the Matter of the Petition of LEWIS KNAUST to Vacate an Assessment.

The act of 1866 (Chap. 367, Laws of 1866), entitled "An act relative to the powers and duties of the commissioners of Central Park," is not violative of the constitutional requirement (State Const., art. 3, § 16), that a local or private bill shall embrace but one subject, which shall be expressed in the title.

The said act was not superseded by the act chapter 697 of the Laws of 1867 (amended by chap. 288, Laws of 1868).

Statement of case.

The power conferred upon the commissioners of Central Park by said act of 1866, in respect to the improvement directed, and subsequently transferred to the department of public works (Chap. 383, Laws of 1870; chap. 872, Laws of 1872), is exclusive of that conferred upon any other body; and the manner of doing the work is left to their discretion.

Accordingly *held*, it was no objection to an assessment for the improvement that there was no ordinance of the common council authorizing it, or that the work was not done by contract let to the lowest bidder.

In re Deering (85 N. Y. 1), distinguished.

(Argued December 8, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made April 8, 1881, which reversed an order of Special Term, vacating an assessment for regulating, grading, etc., Manhattan street in the city of New York.

The facts are sufficiently stated in the opinion.

James A. Deering for appellant. The power to initiate a local improvement and assess can be conferred only by ordinance of the council. (Laws of 1813, chap. 86, § 176; Laws of 1870, chap. 137, § 12; *Matter of Deering*, 85 N. Y. 1.) The failure to advertise for proposals and contract for the work was a substantial error, vitiating the assessment. (Laws of 1861, chap. 308; Laws of 1870, chap. 137, § 104; *Matter of Emigrant Bk.*, 75 N. Y. 388; *Matter of Trustees of Presbytery*, 57 How. Pr. 500; *Matter of Robbins*, 82 N. Y. 131; *Matter of Merriam*, 84 id. 80; *Matter of Lange*, 85 id. 14.) The departments of public parks and public works, which succeeded to the jurisdiction of the department of parks under chapter 872, Laws of 1872, had not jurisdiction to improve Manhattan street in any manner whatever. (Laws of 1867, chap. 867; Laws of 1859, chap. 363; Laws of 1864, chap. 275; Laws of 1864, chap. 319; Laws of 1865, chap. 564; chap. 565; chap. 581; Laws of 1866, chap. 367; chap. 550; chap. 632; *People v. Brooklyn*, 69 N. Y. 605; Sedg. on Stat. Constr. 97, 104, 365, 377.) The fact that it was shown or retained, although widened upon the map made in March, 1863, under the act of 1867, did not make it a street "laid out" by the commissioners

Statement of case.

of Central Park. (*Matter of Deering*, 85 N. Y. 1; *Matter of Em. Ind. Bk.*, 73 id. 388; *People v. McNeil*, 2 Supr. Ct. 140.) Chapter 367, Laws of 1866, is unconstitutional. Its title does not express its subject. (*In re Blodgett*, 89 N. Y. 392; *People v. Hill*, 35 id. 449; *Gaskin v. Meek*, 42 id. 186; *People v. Allen*, id. 404; *People v. Brooklyn*, 13 Abb. [N. S.] 121; *In re Suckett St.*, 74 N. Y. 95.) The moneys required for "the maintenance and government of the Central Park" were required to be raised by taxation only. (Laws of 1860, chap. 85, § 4.) The regulating, grading, etc., of a street is an "improvement" thereof. (*Astor v. Mayor, etc.*, 62 N. Y. 580.)

D. J. Dean for respondent. The department of public parks was clothed by the legislature with full power to initiate and prosecute the improvement in question without resolution, or ordinance of the common council. (Laws of 1866, chap. 367, §§ 2, 3, 7; *Astor v. Mayor, etc.*, 62 N. Y. 567.) It was not necessary that the work should be done upon sealed bids and proposals founded upon public advertisement. (Laws of 1857, chap. 771, § 4; *Parr v. Village of Greenbush*, 73 N. Y. 463; *Kingsley v. Brooklyn*, 7 Abb. N. C. 29; *Green v. Mayor, etc.*, 60 N. Y. 303; Laws of 1872, chap. 872, § 7; *In re Robbins*, 82 N. Y. 131; *Kingsland v. Palmer*, 52 id. 85; *In re Commissioners*, 50 id. 493; *In re Cram*, 69 id. 452; Sedgw. Stat. Constr. 98; *In re Zborowski*, 68 N. Y. 88.) No question as to the constitutionality of the act in question can be raised and considered in this court. (*In re Euger*, 46 N. Y. 109; *In re Clark*, 31 Hun, 193; *In re Rich's Case*, 12 Abb. 118; *In re Miller's Case*, id. 121.) When a general purpose is expressed in the title of an act, all matters fairly and reasonably connected with that purpose are germane to the title and properly included in the text to the enactment. (*Harris v. People*, 59 N. Y. 599; *Devlin v. Mayor, etc.*, 63 id. 8; *Kerrigan v. Force*, 68 id. 381; *People v. Briggs*, 50 id. 553; *Volkening*, 52 id. 650; *Wensler v. People*, 58 id. 505; *Matter of Mayer*, 50 id. 504, 86 id. 439; *Sun Mut. Ins. Co. v. Mayor, etc.*, 8 id.

Opinion of the Court, per DANFORTH, J.

253; *Conner v. Mayor, etc.*, 5 id. 293.) The court will not adopt a doubtful construction of a constitutional provision for the purpose of invalidating a statute and defeating the will of the legislature. (*In re Middletown*, 82 N. Y. 199; *Kerri-gan v. Force*, 68 id. 381; *Gilbert Elev. R. R. v. Kobbe*, 70 id. 367.)

DANFORTH, J. At Special Term the petitioner succeeded, but the General Term reversed the decision there made, and he now appeals to this court, alleging two grounds of error: *First*. "The absence of any ordinance of the common council authorizing the improvement" in question; and *Second*. "That the work was not done by contract let after public bidding." The questions were before the court in *Matter of Walter* (75 N. Y. 354), upon the same assessment, but the case was determined upon other propositions, and these were not passed upon. They are, however, insufficient to sustain this appeal. The act of 1886 (Chap. 367, § 1) made it the duty of the commissioners of Central Park to lay out and establish the grade of an avenue to be called St. Nicholas, empowered them to extend and widen Manhattan street, and whenever they should deem it necessary "fix and establish, or change the grade of any street or avenue, or any part of any street or avenue that intersects any street, road or avenue required by law to be laid out, established, regulated or improved by them, or under their direction." They were also directed (§ 3 of same act) to make and file maps of surveys of the avenue and of the widening and extension of Manhattan street, showing its width, location and grade. Section 4 makes these maps and surveys final and conclusive in respect to the matters referred to, "as well in respect to the mayor, aldermen and commonalty of the city of New York as in respect to the owners and occupants" of lands affected thereby, and "in respect to all persons whomsoever." Section 7 of the same act declares that "the said commissioners of the Central Park shall, with respect to the avenue to be laid out by them, as required by this act, and with respect to that portion of Seventh

Opinion of the Court, per DANFORTH, J.

avenue lying north of the Central Park, in said city, and with respect to all streets, avenues, roads and portions of said city required by law to be laid out or improved, under the direction of the said commissioners, *and the laying out, grading, regulating, sewerage, paving, and improving the same, possess all the powers and perform all the duties now or heretofore possessed, enjoyed or exercised by such commissioners in respect to the Central Park, in said city, and by the mayor, aldermen and commonalty of the city of New York, and the several departments of the said city, in relation to the said streets, avenues and similar improvements thereof in other parts of said city,*" and enacts that "it shall be lawful for the said commissioners to do all the work required to be done by them, by day's work, or by contract, or in such manner as they shall deem expedient." In *Walter's Case* (*supra*) it appeared that the whole work on Manhattan street, including paving, for which the assessment in question was made, was covered by a single resolution of the department of public parks, passed on the 2d of May, 1871, for the regulating, grading, paving and improving Manhattan street from Twelfth avenue to Avenue St. Nicholas. That resolution was said to be "the acknowledged source of authority for the work," and it was all done under the direction of that department and its successor, the department of public works. Such is the case here. The resolution at the bottom of the proceedings is that of the commissioners referred to in the *Walter Case*, and under it the work was done, partly by contract and partly by the day. It was completed by the department of public works, to which the powers of the Central Park commissioners were transferred. (Laws of 1870, chap. 383, § 16; Laws of 1872, chap. 872, § 7.) The language of the act of 1866, above quoted, is so plain and comprehensive as to permit no other construction than that given to it by the commissioners. The power granted in respect to the improvement was exclusive of that of any other body, and the manner of doing it is left to their discretion. As to both matters their authority was ample.

Opinion of the Court, per DANFORTH, J.

Matter of Deering (85 N. Y. 1, 11), referred to by the appellant, has no application. The avenue, to the improvement of which the proceedings then in question related, had already been laid out and opened, and improvements made under direction of the city government; and as the act of 1865 (Chap. 506), by which it was sought to justify them, confined and limited the power of the commissioners of Central Park to streets laid out by them, it was held they had no jurisdiction, and that the assessment was invalid for want of some resolution or ordinance of the common council authorizing the work. The decision turned on the construction of the statute.

In the case at bar there is no such limitation, and the statute under which the commissioners have acted specifically conferred the power which they have exercised. It authorized the improvement and declared the powers of the commissioners in respect thereto. It not only authorized the laying out of streets, but extended the power of the commissioners so as to include all streets, whether laid out by them, or simply improved under their direction; as to those they were vested with all the powers possessed by them in respect to Central Park, and by the corporation of the city and its several departments over such matters.

A variety of cases are cited by the appellant in support of the objection that the work was not contracted for after advertisement for proposals. They relate to work done under the charter or city ordinances, but imply no limitation to a discretionary power in respect to work ordered by a body whose jurisdiction is derived directly from the legislature.

It is also contended in behalf of the appellant that the act of 1866 was superseded by the act of 1867 (Chap. 696), amended in 1868 (Chap. 288). There are no express words to that effect, and if repealed it is by implication. Such effect cannot be given to the later act, unless its provisions are so inconsistent with, or repugnant to, those of the other, that the two cannot stand together. Nor is the court to strive for such a result. If it is not apparent that the legislature did intend to deal with the very case to which the

Opinion of the Court, per DANFORTH, J.

former statute applied, it should not be disturbed. Here we find no such intention. The existing power of the commissioners is extended, and neither extinguished nor taken away. Their jurisdiction over Manhattan street was specifically conferred by the act of 1866. Its exercise was not forbidden by the act of 1867; nor is it inconsistent with its provisions.

A larger question is also presented. The learned counsel for the appellant insists that the act of 1866 is unconstitutional, saying, "Its title does not express its subject." It is, "An act relative to the powers and duties of the commissioners of Central Park," and a careful scrutiny of its provisions has not enabled us to discover in what respect—having in mind repeated decisions in answer to such objection—the title could be improved. It expresses a general object, and it must now be considered as the settled rule of construction that where such is the case, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act and are germane to the title. (*People v. Briggs*, 50 N. Y. 553; *In re Mayer*, id. 504; *In re Department of Public Parks*, 86 id. 437; *In re Upson*, 89 id. 67; *Water Commissioners of Clinton v. Dwight*.) Those now before us are strictly within this rule. The provisions of the act, if literally applied, would include no matter not intrusted to the commissioners, nor any subject over which they are not by its terms given jurisdiction. Each section of the act defines a power or prescribes a duty of the commissioners.

We agree with the General Term in the conclusion that the assessment was well laid. The order appealed from should, therefore, be affirmed.

All concur.

Order affirmed.

* *Ante*, page 9.

Statement of case.

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PEOPLE, ex rel. LEON VAN HECK, Respondent, v. NEW YORK
CATHOLIC PROTECTORY, Appellant.

The section of the Penal Code (§ 391), authorizing and directing the arrest of children found begging, etc., and their commitment "to any charitable reformatory or other institution authorized by law to receive and take charge of minors," does not repeal, or, as to commitments under said act to the New York Catholic Protectory, dispense with the provisions of the charter of said protectory (Chap. 448, Laws of 1863), or of the Consolidation Act (§ 1818 *et seq.*, chap. 410, Laws of 1882) requiring notice of the commitment to be given to the parents, guardian, etc., of a child so committed, and giving the parents or guardian an opportunity to be heard. *It seems* the section simply means that the magistrate or court before whom the child is brought, knowing the authority of the different institutions to receive and retain minors, and the limitations upon that authority, may select from among them the one he deems most fitting, and the one so selected takes and holds the child for the time, in the manner and under the regulations prescribed by its fundamental law.

Where, therefore, a boy nine years of age was committed for begging to said protectory, to remain under its guardianship "until therefrom discharged in manner prescribed by law," no notice of the commitment having been given to the father of the child, and upon returns to a writ of *certiorari* and to a writ of *habeas corpus* to inquire into the cause of the commitment, which writs were issued more than twenty days after the commitment, the boy was discharged. *Held* no error.

(Argued December 22, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made October 30, 1885, which reversed an order of Special Term dismissing a writ of *certiorari* and of *habeas corpus* issued herein, and which directed that John Van Heck, son of the relator, be discharged from the custody of defendant and delivered to the custody and control of relator.

The material facts are stated in the opinion.

Elbridge T. Gerry for appellant. Where the merits of a case have once been inquired into before the committing magistrate and the commitment made the appellate tribunal will not review the facts, but confine itself to errors appearing on the

face of the commitment. (*People, ex rel. v. Sisters of St. Dominick*, 1 How. Pr. [N. S.] 132; *In re Moses*, 13 Abb. N. C. 189.) The child was properly committed under the Penal Code, which does not require any notice to be given. (Laws of 1882, chap. 410; Laws of 1884, chap. 46, §§ 5, 6; amending §§ 291, 292 of Penal Code; *People, ex rel., v. Catholic Protectory*, 61 How. Pr. 445.)

F. R. Coudert for respondent. The child was not one of those the Catholic Protectory is authorized to receive under commitment. (Penal Code, § 291; Laws of 1882, chap. 410, §§ 1619, 1621, 1622; *People, ex rel. v. N. Y. Juvenile Asylum*, 12 Abb. Pr. 95.) Under the commitment made by virtue of section 291 of the Penal Code, reference must be had to the law governing the institution in order to ascertain whether it is authorized to receive the particular child committed. (*In re Moses*, 13 Abb. N. C. 196; *People, ex rel. v. N. Y. Juvenile Asylum*, 12 Abb. Pr. 95; Code of Crim. Pro., § 887, subd. 8.) A law which allows a child to be taken from its parents and committed to an institution during its minority, without notice to the parents or an opportunity for them to be heard, violates the constitutional principle which allows to all citizens the "enjoyment of life, liberty and pursuit of happiness." (*Bartemeyer v. Iowa*, 18 Wall. 136, 139, 140; *Butcher's Union Co. v. Crescent City Co.*, 111 U. S. 746; *People v. Marx*, 99 N. Y. 377.)

FINCH, J. A police justice of the city of New York, on the 5th day of November, 1884, committed John Van Heck, a boy of the age of nine years, to the Catholic Protectory, for begging in the streets, in violation, as the commitment asserted, of the Consolidation Act of 1882, of the Penal Code, and of the Code of Criminal Procedure. Under which of these acts the magistrate proceeded he did not at all determine, and we have no means of knowing. The commitment directed that the child should be and remain under the guardianship of the Protectory "until therefrom discharged in man-

ner prescribed by law." There is no provision for his discharge, unless the requirements of the charter of the Protectory, which determine how long he may be held by that institution, are unrepealed and remain applicable to the case. More than twenty days after this commitment, and on the twenty-third day of the following December, a writ of *certiorari*, and on the fifteenth day of January in the next year, a writ of *habeas corpus* was issued to inquire into the detention of the child. The process was awarded upon the petition of the father, who alleged that the act of the child in soliciting alms, if such act did occur, was not due to the petitioner's neglect or misconduct, but that the child had been an attendant at the city schools from the 16th of April, 1884, to the 1st of November, 1884, just five days before he, with his mother, were arrested for beggary. He further alleged that the child had never been guilty of violating section 290 of the Penal Code, as recited in the warrant; and that is admitted; the answer being that section 291 was intended, and the reference to section 290 was a clerical error. He further alleged that no notice, as required by law, was given to him, either by personal service or by posting in the station-house. As the mother was arrested with the child, and very probably herself committed, the father was left to miss his son and find what had happened to him as best he might be able. And then, upon discovering the facts, he is met by the contention of the Protectory that the commitment is final, and no notice to the father was requisite, and he had no right to be heard upon the question of the disposition of his child; and that is said to result from the effect of section 291 of the Penal Code, which is claimed to have made unavailing and inapplicable the wise and prudent provisions of the charter of the Protectory. That institution is a very worthy and commendable charity, intended primarily for the benefit of Catholic children, and to save them from suffering, and throw over them the care and protection of the Catholic church. (Laws of 1863, chap. 448.)

The New York Juvenile Asylum is a similar charity, having in its charter corresponding provisions as to notice, and in-

tended primarily for the benefit of Protestant children. If a police magistrate of the city may commit a child of tender years found soliciting alms in the street, without notice to the parents, and giving them an opportunity to be heard, several results may follow. A boy, nine years old, may have begged in the street, without the knowledge of his parents, or any cause or occasion so far as they were concerned; be convicted without the least chance of defense or explanation; be sent to one or the other of these institutions permanently during his minority; and without opportunity for redress. For the construction of the Penal Code which makes the commitment absolute and final and sweeps out a part of the terms on which the institution can receive and hold the child, must necessarily sweep them all out, and, among the rest, section 1623 of the Consolidation Act which directs the corporation when it shall be made to appear to its satisfaction that the child has been committed "on insufficient cause, false or deficient testimony, or otherwise wrongfully or improvidently committed," to discharge him from its custody. If not, an absolute commitment by the magistrate may be reversed by the Protectory. It may further result that, where the beggary and destitution were real and a commitment proper, the magistrate may ignorantly and innocently, or following the drift of his own denominational convictions, send the child of Catholic parents to be educated and brought up under Protestant influences, or the reverse. The provisions relating to the Protectory are found in the Consolidation Act and were substantially copied from the charter of the institution passed in 1863 and subsequent acts amending it. By section 1618 a magistrate of the city may send to the Protectory children between the ages of seven and fourteen found in any street or public place "in circumstances of want and suffering or abandonment, exposure, or neglect, or of beggary," and the form of commitment is prescribed. The child is to be conveyed "to the house of reception established by said corporation," and such child is to be there detained until removed or discharged as afterward provided. Section 1619 commands that "*immediately* upon the making of such order the magistrate or

court making the same shall deliver to a policeman of the city, especially detailed for that purpose, a notice, in writing, addressed to the father of such child, if its father be living and resident within the city, and if not, then to its mother if she be living and be so resident, and, if there be no father or mother of such child resident within the city, then addressed to the lawful guardian of such child, if any, or to the person with whom, according to the examination of the child and the testimony, if any, received by such magistrate or court, such child shall reside, in which notice the party to whom the same is addressed shall be informed of the commitment of such child to the house of reception of said corporation, and shall be notified that, unless taken therefrom in the manner prescribed by law within twenty days after the service of such notice, the child therein named shall be committed to the asylum of said corporation." Section 1620 provides for the personal service of the notice and, if that has proved impossible, then for a substituted service by posting a notice, the form of which is prescribed, in the police station nearest the alleged residence of the child. By section 1621 if, within the twenty days, the parent or other person shall prove to the satisfaction of the committing magistrate that the suffering or destitution have not been occasioned by the habitual neglect or misconduct of the parents or guardian, the magistrate is required to order the child to be discharged; but by section 1622 it is directed that, in case no such proof is made or nobody appears, the magistrate shall transmit to the superintendent of the Protectory a notice to that effect, whereupon the child shall be removed to the asylum of the corporation. Section 1623 we have already referred to as providing for a discharge by the corporation, not only when satisfied that the commitment was without due cause, but whenever circumstances after occurring render it proper or expedient.

It is obvious that these provisions relate not to a case of crime, but one of misfortune on the part of the child and often of the parents. They result in depriving the latter of their children, to whose care and custody they have a natural right,

and the injustice of doing so without giving them opportunity to be heard, and to show the real facts, is sedulously avoided. All this wise and careful provision results in a double opportunity of the parent to be heard. During the twenty days he may satisfy the magistrate that the begging was no fault of his, and after the twenty days he may apply to the Protectory. The section of the Penal Code which is said to override and change all this is as follows. After describing the children to whom it applies as those begging, homeless orphans or children of criminals, frequenting the company and dens of thieves and prostitutes, it authorizes the court or magistrate to commit the child to *any* charitable, reformatory, or other institution, authorized by law to receive and take charge of minors, or make any disposition of the child such as now is or hereafter may be authorized in the cases of vagrants, truants, paupers or disorderly persons. There is nothing in this section which repeals by implication any of the provisions of the Consolidation Act. It authorizes a commitment. As the General Term suggest, it does not say it shall be absolute, final, unconditional. Most clearly it means that the magistrate, knowing the authority of the different institutions to receive and retain, and the existing limitations upon that authority, may select from among them that which he deems most fitting. The enactments can be read together and easily stand together without the least clash or conflict, and where that can be done our duty is to reconcile them and give to each its operative force. A further rule of construction points to the same result. The provisions of the Consolidation Act defining the authority of the Protectory are local and special, confined to the city of New York, and having respect to its situation and needs. The provision of the Penal Code is general and applies to the State at large. It is the uniform rule that such a special and local act is not repealed or modified by the later general one, unless some specific words plainly disclose that intention. We are bound to apply these rules, and especially so in a class of cases which involve questions of personal liberty and parental control. A construction which stands

upon the Penal Code alone and rejects the influence and modifying effect of the charters is very clearly shown to be inadmissible by an illustration suggested by the learned counsel for the respondent. Under section 1466 of the Consolidation Act, certain females over fourteen and under twenty-one may be committed to the Protestant Episcopal House of Mercy or the Roman Catholic House of the Good Shepherd. These institutions answer the sole description of the Penal Code as "authorized by law to receive and take charge of minors," and so, on the construction claimed, this boy might have been lawfully committed to one of those institutions. The same thing would be true, as it respects the New York Infant Asylum, which is authorized to receive children of two years or under; and as it respects the American Female Guardian Society, which receives girls under fourteen and boys under ten. Could a boy over fourteen but under sixteen be committed to this latter institution by force of the Code? Institutions abound by whose fundamental law they are fitted and adapted to each of the varying forms of misfortune and vice. Does the Penal Code disregard this fitness and adaptation and mean to substitute for it the unlimited discretion of a magistrate?

The learned counsel for the appellant put stress upon the alternative provisions of section 291, which permit the magistrate to commit the child to a charitable institution, or "make any disposition of the child, such as now is or hereafter may be authorized in the cases of vagrants, truants, paupers or disorderly persons." Different classes of children are brought within the section and obviously require very different treatment. These are children found begging; those who are homeless; destitute orphans; children of convicted criminals, living with them; and those frequenting concert and liquor saloons, or associating with thieves and prostitutes. If the Penal Code means that a child who is merely homeless, or a destitute orphan may be punished as a disorderly person, it is extremely harsh and unjust. But its meaning is much more sensible. The section itself provides that the child must be proceeded against, "as a vagrant, disorderly or destitute

Statement of case.

child," and whichever is selected as the ground of complaint must be supported by the proper and competent proof. The complaint here, and its proof, was not that the child was disorderly or destitute, but that it was a vagrant. Under the Revised Statutes a child found begging was classed with vagrants and sent to the county house or the alms-house till discharged by the superintendents of the poor, and without notice to the parent, as it is said may be done now. (1 R. S. 633, § 4; Code of Crim. Pro., §§ 887, 893.) But in such case the child passes into the custody of public officers authorized to discharge, and as public officers amenable to authority, and naturally anxious to lessen the public burden at the earliest opportunity. When in such a case a private charity was substituted as the custodian, whose officers are but individuals, and governed by their own charter instead of the public law, it is not to be supposed that restrictions and limitations, prudently and carefully interposed to fit the emergency, were intended to be taken away, and suddenly and without reason deemed unnecessary. We are impressed with the conviction that the sole effect of the first alternative contained in section 291 is to permit the magistrate who, theretofore, under the Consolidation Act, could commit the destitute child to but one of three specified institutions, to commit such child to *any* charitable or reformatory institution authorized by law to take charge of minors, but in every case the institution so authorized was left to take and hold the child for the time and in the manner and under the regulations prescribed by its fundamental law.

The order should be affirmed.

All concur, except EARL, J., not voting.

Order affirmed.

THE STEUBEN COUNTY BANK, Respondent, v. JOHN L. ALBERGER et al., Appellants.

Where a member of a firm, who had charge of its financial business, took up firm notes by giving in exchange therefor notes of a third person,

Opinion of the Court, per RUGER, Ch. J.

indorsed by him in the firm name, which indorsement was without the knowledge of his partner,—*Held*, that the indorsement was within the authority of the partner making it; and that the firm was liable thereon.

(Argued December 9, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made April 26, 1879, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was against defendants as members of the firm of J. L. Alberger & Co., upon indorsements in the name of that firm upon notes made by S. W. Nash, payable to the order of the firm, which indorsements were made by one of the members of the firm.

The material facts are stated in the opinion.

John Campbell Hubbell for appellants. Plaintiff, not being a *bona fide* holder without notice, cannot invoke the presumption that the paper was issued within the scope of the partnership business. (*Fielden v. Lahens*, 6 Abb. [N. S.] 341; *Stall v. Catskill Bk.*, 18 Wend. 478; *Bk. of Rochester v. Bowen*, 7 id. 158; *Joyce v. Williams*, 14 id. 141; *Gansevoort v. Williams*, id. 133.)

Spencer Clinton for respondent.

RUGER, Ch. J. The sole ground of error alleged, in the judgment appealed from is, that there was not sufficient evidence to sustain the finding of the referee, that John L. Alberger was authorized to use the firm name of J. L. Alberger & Co., as accommodation indorser upon the notes of S. W. Nash. The findings of the referee, as well as the proof, showed that on the 4th day of November, 1873, the plaintiff held two notes for \$5,000 each, made by J. L. Alberger & Co., and upon which they were unquestionably liable, as principal debtors. One of said notes was past due and unpaid, and the notes in suit were made by S. W. Nash and indorsed by J. L. Alber-

Opinion of the Court, per RUGER, Ch. J.

ger & Co., for the purpose of retiring the former ones, and they were used in doing so. The notes for \$5,000 each, held by the plaintiff as described, were made by J. L. Alberger on behalf of his firm and exchanged with said Nash for his notes of a similar date and amount for the purpose of enabling Nash to borrow money thereon, and he did obtain the money on them from the plaintiff. Said Nash and the firm of J. L. Alberger & Co. both resided and carried on business at Buffalo, and had been for several years prior to the execution of the notes in suit, in the habit of exchanging notes with each other, for their respective accommodations. Samuel F. Alberger had knowledge of this course of business, and so far as appears, approved the same. It farther appeared that John L. Alberger had charge of the financial business of his firm, gave its notes and provided funds for their payment, borrowed money and notes for its accommodation, and attended generally to the business of raising funds, with which to meet its obligations. Under these circumstances the notes in suit were indorsed in the firm name by John L. Alberger without the knowledge of his partner, Samuel F. Alberger, for the purpose stated.

We do not doubt but that the making of the indorsements in question, was entirely within the general authority of the financial partner of the firm, to provide funds to meet its liabilities. The notes for which those in suit were exchanged were given by the firm for value, and constituted obligations, upon which the firm were unquestionably liable; and in making the indorsements in question in the firm name, John L. Alberger was simply performing the duty which he had always exercised in the management of the affairs of the firm, of providing funds to meet its liabilities. The notes in suit were actually used in retiring the obligations of the firm, and, so far as the case showed, no limitation was ever placed upon the power of John L. Alberger to provide funds for such a purpose. In this case he procured the extinguishment of their liability as principal debtors by substituting therefor a conditional liability as indorsers, and imposed the primary duty of

Statement of case.

paying the indebtedness upon another; and such an exercise of power was, we think, within the authority previously exercised by him as the financial member of the firm. (*Commercial Bank of L. E. v. Norton*, 1 Hill, 501.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

ABRAHAM WAKEMAN, JR., et al., Appellants, v. THE WHEELER & WILSON MANUFACTURING COMPANY, Respondent.

The parties entered into a contract by which defendant agreed that, if plaintiffs should succeed in selling fifty of the defendant's sewing machines to one firm or party in Mexico, during a trip of their agent about to be made, for every fifty machines so sold they should have the sole agency for the sale of said machines in that locality, and defendant agreed to furnish the machines. Plaintiffs' agent made two sales of fifty machines to persons in different localities in Mexico under an agreement that the purchaser should be the sole agent for the sale of the machines in that locality; one of the orders defendant filled, the other it refused, and refused to fill further orders from plaintiffs or their agents, and repudiated the contract. In an action to recover damages for breach of the contract, *held*, that plaintiffs were not confined to the damages sustained by reason of the refusal of the defendant to fill the orders actually given, but were entitled to recover such damages as they could show they had sustained by a total breach of the contract; *i. e.*, the value of the contract, not merely imaginary or speculative damages, but such as were reasonably certain, and such only as actually followed or might follow from such breach, such as a jury could determine approximately upon reasonable conjecture and probable estimates.

A person violating a contract should not be permitted entirely to escape liability because the amount of the damage he has caused is uncertain.

Prospective profits, so far as they can properly be proved, and which would certainly have been realized but for defendant's default, are allowable as damages, although the amount is uncertain.

The rule that damages which are contingent and uncertain cannot be recovered embraces only such as are not the certain result of the breach, not such as are the certain result but uncertain in amount.

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Statement of case.

The authorities on the subject of the allowance of prospective profits as damages collated and discussed.

Howe Machine Co. v. Bryson (44 Iowa, 159), disapproved.

Plaintiff offered to show on the trial, that, subsequent to the repudiation of the agreement, defendant established agencies in Mexico, and the number of machines sold through them. This was excluded. *Held* error.

But *held*, that the opinions of witnesses as to the value of the agreement, the profits which it, or any agency established in pursuance of it, could produce, the damages realized, and as to the number of machines they could have sold, were properly excluded.

Taylor v. Bradley (39 N. Y. 129), limited.

Mitchell v. Read (84 N. Y. 558), distinguished.

(Argued December 11, 1885 ; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made March 15, 1883, which affirmed a judgment in favor of plaintiffs, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for an alleged breach of contract, the substance of which as well as the material facts are set forth in the opinion.

Abram Wakeman for appellants. The plaintiffs are entitled to recover as damages the value of their contract; that is, what such a privilege as was conferred by their contract, under all the circumstances, was fairly worth. (*Taylor v. Bradley*, 39 N. Y. 129, 144 ; *Griffin v. Colver*, 16 id. 494.) If there is no more certain method of arriving at the amount, the injured party is entitled to submit to the jury the particular facts and to show the whole situation which is the foundation of the claim and expectation of profit, so far as any detail offered has a legal tendency to support such claims. (1 Suther. on Dam. 113.)

William H. Williams for respondent. The alleged contract between the plaintiffs and defendant was by parol, and was not, by its terms, to be performed within one year from the making thereof, and was, therefore, void. (2 R. S. 136, § 2 ;

Statement of case.

Oddy v. James, 48 N. Y. 685; *Dung v. Parker*, 52 id. 494; *Childs v. Warren Chem. Manfg. Co.*, 13 Weekly Dig. 59.) Defendant's agreement to furnish the plaintiffs' machines at the lowest net gold prices was a contract for the sale and supply of machines, and was void because no note or memorandum in writing was made. (2 R. S. 136, § 3; *Cook v. Millard*, 65 N. Y. 352.) The jury having found that there was an agreement as alleged, which defendant had violated, the measure of damages was the profits lost on actual sales made by plaintiffs. Estimates of probable sales furnish no proper criterion for fixing damages. (*Washburn v. Hubbard*, 6 Lans. 1; *Griffin v. Colver*, 16 N. Y. 489; *Blanchard v. Ely*, 21 Wend. 342; *Mitchell v. Cornell*, 44 N. Y. Supr. Ct. 401; *Masterton v. Mayor, etc.*, 7 Hill, 62; *White v. Miller*, 71 N. Y. 118; *Hamilton v. McPherson*, 28 id. 77; *Morey v. Mut. Gas-light Co.*, 38 Supr. Ct. 189; *Schooner Lively*, 1 Gall. 315; *Washburn v. Hubbard*, 6 Lans. 14; *Cassidy v. Lefevre*, 45 N. Y. 562.) The plaintiffs cannot recover for loss of custom not specially alleged in their complaint. (*Stapenhorst v. Am. Mfg. Co.*, 15 Abb. [N. S.] 355; *Shipman v. Burrows*, 1 Hall, 442; *Low v. Archer*, 12 N. Y. 282; *Vanderslice v. Newton*, 4 id. 130.) The contract being in part executory, plaintiffs were not entitled to recover damages for defendant's refusal to deliver the machines, unless they alleged in their complaint and proved on the trial that they had performed, or offered to perform, the conditions of the sale on their part. (Chitty on Cont. [10th Am. ed.] 467; Benj. on Sales, 638, § 562; *Cutler v. Powell*, 3 Smith's Lead. Cas. [note to Am. ed.] 23.) Any effect the termination of the agreement as to the sale of sewing machines might have on the plaintiffs' original business is too remote for a basis for damages in this action. (*Griffin v. Colver*, 16 N. Y. 489; *Hamilton v. McPherson*, 28 id. 77; *Cassidy v. Lefevre*, 45 id. 562.) Sales the plaintiffs could have made and were prevented from making by the act of defendant are special damages, and to be recovered they should have been alleged; not having been, they cannot be proved. (*Stapenhorst v. Am. Mfg. Co.*, 15 Abb. [N. S.] 355.)

Opinion of the Court, per EARL, J.

EARL, J. This action was brought to recover damages for the breach of an agreement made in the city of New York in February, 1878, which is set forth in the complaint as follows: "That if the plaintiffs shall succeed in placing, that is to say, selling, fifty of the defendant's sewing machines to one firm or party in the Republic of Mexico during the next trip of their agent to that country then about to be made, they, the plaintiffs, for every fifty machines so sold shall have the sole agency for the sale of the defendant's sewing machines in that locality and its vicinity in that Republic, and the defendant should furnish to the plaintiffs machines at the lowest net gold prices." The defendant denied the agreement, but the jury found it substantially as alleged; and it is conceded that we must assume here that such an agreement was made. The plaintiffs at once entered upon the performance of the agreement, purchased a sample machine of the defendant, caused their agent to be instructed in its mechanism and management, and then sent him to Mexico. After reaching there he sold fifty machines to one Mead of San Louis Potosi, on his promise to Mead that he should be the general agent of the defendant for that locality and its vicinity. The order for the fifty machines was sent to the defendant and filled by it, and those machines were forwarded to Mexico and paid for. Shortly thereafter plaintiffs' agent made another sale of fifty machines for another locality in Mexico, and an order for those machines was sent to the defendant, which it absolutely refused to fill. Plaintiffs' agent procured another order for one machine and sent that to the defendant, which it also refused to fill; and then it refused to fill any further orders from the plaintiffs or their agents, and absolutely refused to perform and repudiated its agreement. Upon the trial of the action the plaintiffs made various offers of evidence to show the value of their contract with the defendant, the most of which were excluded. In his charge to the jury the judge held as matter of law that the plaintiffs could recover damages only for the refusal of the defendant to fill the orders actually given; and the plaintiffs' profits having been shown to be \$4 on a machine, their recovery was thus limited to \$204.

Opinion of the Court, per EARL, J.

They excepted to the rule of damages thus laid down, and the sole question for our determination is what, upon the facts of this case, was the proper rule of damages? Were the plaintiffs confined to the damages suffered by them in consequence of the refusal of the defendant to fill the two orders for fifty-one machines, or were they entitled also to recover the damages which they sustained by a total breach of the agreement on the part of the defendant? The judge limited the damages, as stated in his charge, because any further allowance of damages for the breach of the agreement would, as he claimed, be merely speculative and imaginary.

It is frequently difficult to apply the rules of damages and to determine how far and when opinion evidence may be received to prove the amount of damages; and the difficulty is encountered in a marked degree in this case. One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be not merely speculative, possible and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. They may be so remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they cannot be allowed. They are nearly always involved in some uncertainty and contingency; usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent and imaginary as to be incapable of adequate proof, and then they cannot be recovered because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses

sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the application of rules of law which have been laid down for the guidance of courts and jurors.

These rules will be illustrated and limited by a few cases, some of which are quite analogous to this, to which attention will now be called. In *Masterton v. Mayor, etc.* (7 Hill, 61), NELSON, Ch. J., said: "When the books speak of the profits anticipated from a good bargain as matter too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. * * * But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing * * * It is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages." In *Bagley v. Smith* (10 N. Y. 489), it was held that one partner could maintain an action at law against the other for a breach of the partnership articles in dissolving before the period therein limited; that the damages in such an action are the profits which would have ac-

Opinion of the Court, per EARL, J.

crued to the plaintiff from the continuation of the partnership business and which are lost by the unauthorized dissolution, and that evidence of the actual gains of the partnership during its continuance is admissible as an element in determining the value of the prospective profits. JOHNSON, J., writing the opinion said: "The object of commercial partnerships is profit. This is the motive upon which men enter into the relation. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss of profits. Unless that loss can be made up to the injured party it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period. The loss of profits is one of the common grounds, and the amount of profits lost one of the common measures of the damages to be given upon a breach of contract," and that "it is very true that there is great difficulty in making an accurate estimate of future profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry by reason of its difficulty, when we remember that it is the misconduct of the defendant which has rendered it necessary." In *Taylor v. Bradley* (39 N. Y. 129), the action was to recover damages for the total breach by the defendant of a contract to let a farm to the plaintiff for three years, each party to furnish part of the stock, seeds, tools, etc., the plaintiff to occupy and work the farm and have certain specified supplies for his family, and all proceeds to be divided equally, and it was held that the plaintiff was entitled to recover as damages the value of the contract, that is, what such a privilege of occupancy and working the farm, subject to the conditions of the agreement and under all the contingencies which were liable to affect the result, was worth. WOODRUFF, J., writing the opinion, said: "To my mind the only rule which will do justice to the parties is that the plaintiff is entitled to the value of his contract; he was

entitled to its performance; it is broken; he is deprived of his adventure; what was this opportunity which the contract had apparently secured to him worth? To reap the benefit of it he must incur expense, submit to labor and appropriation of his stock. His damages are what he lost by being deprived of his chance of profit." An opinion in the same case by Judge GROVER is reported in 4 Abb. Ct. of App. Dec. 363, in which he said: "An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of the contract; in other words, for the benefits and gains he would have realized from its performance, and nothing more. It is sometimes said that the profits that would have been derived from performance cannot be recovered; but this is only true of such as are contingent upon some other operation. Profits which would certainly have been realized but for the defendant's default are recoverable. * * * It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit would be derived at all. * * * It is sometimes said that speculative damages cannot be recovered because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of. The general rule is that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount;" that "the plaintiff will be fully compensated by recovering the value of his bargain. He ought not to have more, and I think he is not precluded from recovering this by any infirmity in the law in ascertaining its amount." In *Schell v. Plumb* (55 N. Y. 592), it was held that an agreement by one

Opinion of the Court, per EARL, J.

party to support another during life is an entire continuing contract, and that upon a total breach thereof the latter may recover full and final damages, not only the expenses of support up to the time of trial, but all the prospective expenses during life, and that the Northampton Tables are competent evidence as to the probable duration of life. GROVER, J., writing the opinion, said: "The counsel for the appellants insists that such cannot be the rule, for the reason, as he insists, that it is impossible to ascertain the damages, as the duration of life is uncertain, and a further uncertainty arising from the future physical condition of the person. * * * * It may be further remarked that in actions for personal injuries the constant practice is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain notwithstanding the uncertainty of the duration of his life and other contingencies which may probably affect the amount." In *Dennis v. Macfield* (10 Allen, 138), it was held that if a written contract by which the master of a whaling ship is employed provides that he shall have a certain "lay" in the proceeds and also an additional compensation depending upon the amount of the cargo, and he is wrongfully discharged by the owners before the expiration of the contract, he may recover as a part of his damages his share of the earnings of the ship both before and after his removal. BIGELOW, Ch. J., writing the opinion and speaking of the earnings of the ship, said: "They are undoubtedly in their nature contingent and speculative and difficult of estimate, but being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled. Would it be a good bar to a claim for damages for breach of articles of copartnership that the profits of the contemplated business were uncertain, contingent and difficult of proof, and could it be held for this reason that no recovery could be had in case of a breach of such a contract? Or in an action on a policy of insurance on profits, would it be a valid defense in the event of loss to say that no damages could be claimed or proved because the subject of insurance was merely speculative,

and the data on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity?"

In *Simpson v. London & N. W. R. Co.* (L. R., 1 Q. B. D. 274), the plaintiff, a manufacturer, who was in the habit of attending agricultural shows to exhibit samples of his goods, and made profit by the practice, delivered them upon a show-ground where he had been exhibiting them, to the receiving agent of the defendant, a railroad company, to be carried by a particular day to a show-ground at another place where a similar show at which he intended to exhibit was to be held; but nothing was expressly said about the intention of the plaintiff. The samples did not arrive until after the day stipulated and when the show was over; and the plaintiff lost several days in going to meet them and waiting for them. In an action for the breach of contract a verdict was given for damages which included a sum for loss of time or loss of profit; and it was held that the purpose of the plaintiff to exhibit was within the contemplation of the parties to the contract; that the plaintiff was entitled to the damages, on the ground that loss of profit was a natural and probable result of the failure of that purpose; and that no evidence was necessary of his prospect of making profit at the particular show in question. COOKBURN, C. J., said: "As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all." MELLOR, J., said: "As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, that is not a matter upon which we have to trouble ourselves." FIELD, J., said: "As to the difficulty of ascertaining the profits which the plaintiff can be considered to have lost, a sufficient answer is that it must be assumed that the plaintiff would make some profits." In *Jaques v. Millar* (L. R., 6 Ch. Div. 153), the plaintiff agreed with the defendant to take a lease of premises belonging to defendant for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence. In

Opinion of the Court, per EARL, J.

consequence of the defendant's willful refusal to fulfill his agreement, the plaintiff was unable for fifteen weeks to commence his trade; and it was held that, in addition to judgment for specific performance of the agreement, damages must be awarded in respect to plaintiff's loss of profits from his work during the fifteen weeks! To the same effect are the following cases: (*White v. Miller*, 71 N. Y. 118; *Mitchell v. Read*, 84 id. 556; *Danolds v. State*, 89 id. 36; *Hoy v. Gro-noble*, 34 Penn. 9; *Garsed v. Turner*, 71 id. 56; *McNeil v. Reid*, 9 Bing. 68; *Fletcher v. Tayleur*, 17 C. B. 21.)

In conflict, we think, with these authorities is the case of *Howe Machine Co. v. Bryson* (44 Iowa, 159). In that case a party made a contract with the general agents of a sewing machine company, by the terms of which he was to rent a room, provide himself with a team, and furnish other necessary means for the sale of machines, and devote his time thereto, the agents agreeing to furnish him with all the machines he could sell at a price twenty-five per cent below the retail rate. The party performed his undertaking but the machines were not supplied as agreed; and it was held that the measure of damages was the value of the time lost as the result of the breach, without reference to the profits which might have been realized if the contract had been performed. Two of the five judges dissented, and we concur with them.

Under the Civil Damage Act (Chap. 646 of the Laws of 1873), and under the acts allowing the next of kin of one whose death has been caused by the wrong or carelessness of another to recover damages for such death, the amount of damages are exceedingly uncertain, problematical and contingent, and yet they must be left to the determination of a jury upon such facts as can be proved. (*Etherington v. R. R. Co.*, 88 N. Y. 641; *Houghkirk v. D. & H. C. Co.*, 92 id. 219.)

It is quite clear that the rules of damages having the sanction of these authorities were violated upon the trial of this action. The plaintiffs had the right under their agreement to establish agencies for the sale of defendant's machines anywhere in Mexico where they could sell fifty machines. An agency, when

thus established, was to be exclusive, and was to have some permanency. It could not be broken up at the will of the defendant without some default on the part of the plaintiffs. That the agreement had some value to the plaintiffs is very clear, and of that value, whatever it was, they were deprived by the act of the defendant. It is quite true that that value, or in other words, the damage caused to the plaintiffs by the total breach of the agreement by the defendant, is quite uncertain and difficult to be estimated. But the difficulty is not greater than it was in several of the cases above cited. There are some facts upon which a jury could base a judgment, not certain nor strictly accurate, but sufficiently so for the administration of justice in such a case. The agent whom plaintiffs sent to Mexico was apparently intelligent, capable and well acquainted with Mexico. Machines could be delivered there, for about \$30 per machine, and could then be sold at retail for about \$125. The profit of the plaintiffs on each machine was about \$4. Plaintiffs' agents readily made sales of one hundred and one machines, and were about to make other sales. One of defendant's agents subsequently sold in a single city twenty machines in six months, at \$125 each. The plaintiffs had established two agencies, and to the value of such agencies at least they were entitled. Mead, who had one of the agencies, testified, that he had made arrangements with several parties to sell the machines; that he had all the facilities for carrying on an extensive and profitable business, and was well acquainted with the country. The population of several of the Mexican cities in which plaintiffs' agent was engaged in establishing agencies was shown. From all these and other facts proved it cannot be doubted that the plaintiffs suffered damages to at least several hundred dollars, and they should not have been deprived of the damages which they made to appear because they could not make clear the full amount of their damages. All the facts should have been submitted to the jury with proper instructions, and their verdict, not based upon mere speculation and possibilities but, upon the facts and circumstances proved, would have approached as near the proper

measure of justice as the nature of the case and the infirmity which attaches to the administration of the law will admit. In 1 Sutherland on Damages, 113, it is said: "If there is no more certain method of arriving at the amount, the injured party is entitled to submit to the jury the particular facts which have transpired, and to show the whole situation which is the foundation of the claim and expectation of profits so far as any detail offered has a legal tendency to support such claim."

The trial judge also erred in excluding evidence which would have given the jury some aid in estimating the damages. The plaintiffs made persistent efforts to show that subsequently to the repudiation of its agreement, the defendant established agencies in Mexico, and the number of machines sold through such agencies. This evidence was, upon the objection of the defendant, excluded. We think it should have been received. It would have shown the market for these machines there, and the facility with which they could be sold, and would have had some tendency to show the extent of business the plaintiffs could have done there and the value of their agreement.

We think the opinions of witnesses as to the value of the agreement, as to the profits which it or any agency established in pursuance of it could produce, as to the damages plaintiffs realized, and as to the number of machines they could have sold, were properly excluded. This was not a case for expert or opinion evidence. There was no certain basis of facts proved, or facts assumed upon which an opinion could be based. The conflicting opinions of interested witnesses, selected because of their favorable opinions, instead of aiding the jury would probably add to their embarrassment. The safer rule in all such cases is to exclude opinions and receive the facts, and then leave the matter for the determination of the jury. They may not have any certain basis upon which to rest their judgments, but that cannot be helped. They are supposed to be disinterested and must apply their experience and common sense to the facts proved and reach the best results they can. Our views as to opinion evidence were so fully expressed in *Ferguson v. Hubbell* (97 N. Y. 507), that they need no restate-

Statement of case.

ment here. We have no means of knowing that the views expressed by Judge WOODRUFF in *Taylor v. Bradley* (*supra*), as to the proof of the damages, by the estimates of witnesses, were coincided in by his associates. They were not necessary to the decision of that case, and we are not prepared to assent to them. In *Mitchell v. Reed* (*supra*), the opinions of witnesses as to the value of certain leases, based upon certain facts assumed, were received. No question was made at any stage of that case that the opinions were not competent. The rule as to opinion evidence was liberally applied in that case, and we are inclined to think properly. There was some certain basis for the foundation of opinions by experts in reference to the worth of property which had salable value.

We have not considered the bearing of the statute of frauds upon this case, as no point or reference to it was made upon the trial.

Our conclusion, therefore, is that this judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

ANDREW SATTERLY, Respondent, v. ROBERT WINNE, Appellant.

In proceedings under the statute (Chap. 174, Laws of 1853) to lay out a private road, exact and technical accuracy is not required, but simply a substantial compliance with the statute.

A description in an application by reference to a private way used by permission of the owner of the land for a great number of years, so that it has come to be called a road, is sufficiently definite.

The statute does not require that the courses shall be specified by the compass in degrees and minutes; and where the general course is given, as easterly, etc., and the exact course and distance can be determined from other particulars in the application, or by natural monuments referred to therein, the statute is substantially complied with.

An application for a private road gave the width of the proposed road, and described it as "beginning at a pair of bars at the westerly terminus of a road known as the Winne road," a private way so called which

Statement of case.

had been used with the consent of the owner for over sixteen years, and by such user had become plainly marked on the ground; the description continued, "running from thence (said bars) easterly along the bed of the said Winne road," and the distances also were given approximately. *Held*, that the center line of the "Winne" road-bed must be considered as intended to be the line described in the application; and that the reference to said road was a sufficient specification of location, courses," etc., as required by the statute.

Where an order of commissioners laying out a private road was indefinite and defective, but referred to the application, declaring that the commissioners had ordered the road to be laid out pursuant to the application, *held*, that the description in the application should be considered as incorporated in the order; that it controlled and determined the *locus* of the road.

It seems if the jury in such proceedings find in favor of laying out the road, the commissioners are bound to lay it out as described in the application; they have no discretion either to refuse to lay it out, to change its location, or to depart in any respect from the road proposed by the applicants.

(Argued December 11, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made December 16, 1882, which granted a new trial on exceptions ordered to be heard at first instance at General Term, the complaint having been dismissed on trial.

This was an action for trespass; the defense was that the *locus in quo* is a private road duly laid out and opened.

The material facts are stated in the opinion.

John E. Van Etten for appellant. If either the commissioners, or the referees, or the Supreme Court acquired jurisdiction of the subject-matter of the road proceedings, their adjudications cannot be collaterally impeached for any errors that may have occurred. (*Dobson v. Pearce*, 12 N. Y. 164; *People v. Com'rs*, 37 id. 363; *M. E. Church v. Mayor, etc.*, 55 How. 61; *Wiggin v. Mayor, etc.*, 9 Paige, 16, 20; *In re Arnold*, 50 N. Y. 26; *Dolan v. Mayor, etc.*, 62 id. 472; *Sherman v. Trustees, etc.*, 27 Hun, 392; *Elliot v. Peirsol*, 1 Pet. 328.) The petition or application for the road under the

Statement of case.

statute, in the case of a private road, confers jurisdiction upon the commissioners in reference to the subject-matter, and controls any order they may make. (Laws of 1853, chap. 174, §§ 1, 12; 1 R. S. 517, §§ 127, 138; *Marble v. Whitney*, 28 N. Y. 297.) The description of the road as contained in the application was sufficiently definite and certain to uphold the proceedings upon a direct review. (*People v. Com'rs*, 37 N. Y. 360; *People v. Taylor*, 34 Barb. 481; *Haverman v. Tavy*, 50 How. 512; *People v. Albright*, 23 id. 306-310; *Coleman v. Manhattan*, 94 N. Y. 229; 18 Weekly Dig. 241; *Crocher v. Crocher*, 5 Hun, 587; *Van Bergen v. Bradley*, 36 N. Y. 317.) The center of the old road-bed will be intended to be the center line of the road laid out. (*People v. Com'rs*, 13 Wend. 310; *Herrick v. Stone*, 5 id. 580; *People v. Com'rs*, 1 Cow. 23; 37 N. Y. 360; *Johnson v. Loveless*, 18 Weekly Dig. 49.) Even if the commissioners did not acquire jurisdiction it was conferred on the referees by plaintiff's appeal. (*People v. Albright*, 23 How. 309; 1 R. S. 519, § 154.) The referees not only had power to have the proofs of allegations of the parties *de novo* upon the merits, but their decision, or that of any two of them, is conclusive in the premises. (1 R. S. 519, § 54; *People v. Com'rs*, 37 N. Y. 363; 2 R. S. [6th ed.] 162, § 154; *People v. Sherman*, 15 Hun, 579.) The defendant cannot, in this collateral action, treat the adjudications already had with contempt and as void for want of jurisdiction. (*People v. Diver*, 19 Hun, 263; *People v. Burton*, 65 N. Y. 453; *Dyckman v. Mayor, etc.*, 5 id. 440.) Had the commissioners' order been questioned before the referees, they had power to make such order as the commissioners should have made. (*People v. Albright*, 23 How. 310; *People v. Com'rs*, 8 N. Y. 476.)

William Lounsbery for respondent. The application for this private road not being in accordance with the statute was void and conferred no jurisdiction on the commissioner. (Laws of 1853, chap. 174, § 1, p. 308.) The requirement that notice of application shall be served upon the persons to whom

Opinion of the Court, per ANDREWS, J.

it is addressed is jurisdictional and cannot be waived or dispensed with. (*People v. Judges of Herkimer*, 20 Wend. 186; *People v. Robertson*, 17 How. 74; *People v. Suprs., etc.*, 36 id. 544.) The order is not in conformity with the statute because the road as described in it is not the road described in the application. (Laws of 1853, chap. 174, § 12; *People v. Taylor*, 34 Barb. 481.) The location of the road must stand upon the order made by the commissioners and not upon any designation subsequently made by them pointing out a location. (*Stewart v. Wallis*, 30 Barb. 344.)

ANDREWS, J. The question in this case turns upon the validity of the proceedings taken in 1877, to lay out a private road over the lands of the plaintiff and Samuel L. Satterly. If the road was legally laid out where the jury in fact intended to lay it out, and where it was staked out by the commissioners, the *locus in quo* of the alleged trespass was within the boundaries of the road, and the action cannot be maintained. The act of 1853 (Chap. 174, § 1) prescribes that an application for a private road shall be made in writing, "specifying its width and location, courses and distances, and the names of the owners and occupants of the land through which the road is proposed to be laid out." The application in this case was in writing, for the laying out of a private road, the width of one and a half rods, "beginning at a pair of *bars* at the westerly terminus of a road known as the 'Winne road,' on the easterly side of the old Kingston and Delaware Turnpike road, and which now leads from the corner, in the town of Shandaken, etc., and which said 'Winne road' leads from said road to a place called Dunderbark; and running from thence (said *bars*) in an easterly course along the bed of said 'Winne road' to the foot of a short hill near a small apple tree, about one hundred and twenty yards; there, leaving the old bed of said 'Winne road,' and continuing in an easterly course along the north side of the said hill about two hundred yards, and there again striking the bed of said 'Winne road,' near a thicket of hemlocks and laurels, on the north side of the road; thence in a northerly

Opinion of the Court, per ANDREWS, J.

course along the bed of said 'Winne road' to the lands of Samuel L. Satterly, about eighty rods; thence continuing in a northerly course along the bed of said 'Winne road' over the lands of said Samuel L. Satterly to the lands of William Satterly, about eighty rods, and which said proposed road is wholly in the said town of Woodstock (Ulster county), and runs through the lands of Andrew Satterly and Samuel L. Satterly."

It will be noticed that the application describes the proposed road as being in the town of Woodstock, county of Ulster, and the width, courses, distances and the *termini*, and further describes it as following the bed of the old "Winne road," except for the distance of about two hundred yards on the second course. The "Winne road" was a way across the lands of the plaintiff and his brother Samuel L. Satterly, which had been used for sixteen or eighteen years by the defendant, and others. It was plainly marked on the ground by such user, but had never been legally laid out, and its use by the defendant had been by the license of the owners of the land only. The description in the application, of the *termini* of the proposed road, is indefinite, except as they are made definite by the reference to the "Winne road." The point of commencement is the "bars," and the point of termination the "lands of William Satterly." But where the "bars" were located, and at what precise point upon the lands of William Satterly the road was to terminate, is made definite by the reference to the "Winne road," provided that road itself is such a definite monument as may be referred to, to make certain the indefiniteness of the description in other respects. The center line of the old road-bed must be intended to be the line described in the application. (*People ex rel. Hawver, v. Commissioners*, 13 Wend. 310.) The location of this center line will determine the exact *termini* of the proposed road. It was held in *People, ex rel. Thomas, v. Commissioners, etc.* (37 N. Y. 360), that a description of a proposed highway by reference to an established highway, was a sufficient description by "routes and bounds," under the General Highway Act. It is true that the description

Opinion of the Court, per ANDREWS, J.

of public highways is usually matter of public record, although this is not always the case, and what the fact was, in this respect in the case cited, does not appear. A private way by permission, not a matter of record, is a less certain monument than a recorded highway. But where such a way has been used for a great number of years, so that it has come to be called a road, there is little chance of uncertainty, and a description in an application by reference to such road gives substantial certainty to the description. The statute must doubtless be substantially complied with, but exact and technical accuracy in proceedings for the laying out of a private road, conducted, as they usually are, by persons not lawyers, cannot be expected. Few private roads would bear the test of a scrutiny which required a verbal and literal conformity to the words of the statute. We think the application did specify with sufficient distinctness the *termini* of the proposed road. The course and distance of each line are stated in the application. The courses are not given by the compass, and the distances are approximate. But these are also made certain by reference to the "Winne road," except where on the second course the proposed road leaves the "Winne road" for the distance of about two hundred yards. But natural monuments—the apple tree, the hill and the thickets of hemlock and laurel—mark the divergence and the point where the old road-bed again becomes the line of the new road. The statute does not require that the courses shall be specified by the compass in degrees and minutes, and where the general course is given in the application as easterly, or westerly, etc., and where the exact course and distance can be determined from other particulars in the application, or by natural monuments referred to therein, the statute is substantially complied with. We are of opinion, therefore, that the application conformed to the statute, and gave jurisdiction to the commissioners to call a jury, and authorized the jury to act upon the application. It is undisputed that the jury, before making their determination, proceeded, in presence of the commissioners, to view the premises; that the proposed road was staked out, and

that the damages were assessed for the land within the boundaries so designated.

The most serious objection in the case arises upon the order of the commissioners laying out and describing the road after the jury had found that it was necessary, and had assessed the damages. The order in describing the road does not follow the description in the application. It describes the road as beginning at the *bars*, etc., "and then running an easterly course of nine hundred and eighty-eight feet, and then a north-east course, seven hundred and sixty feet, and thence bearing a little more east, three hundred and nine feet, thence bearing more north, two hundred and fifty-two feet," and so on. It is indefinite, and except that it refers to the application and declares that the commissioners had ordered that the road be laid out *pursuant to the application*, according to a survey made by them, would be incurably defective. The first course given in the order, running nine hundred and eighty-eight feet, embraces the first two courses in the application. The distance by measurement of the first two lines, as given in the application, is about one thousand feet. The inference from the description in the order, unaided by the application, would be that the first course of nine hundred and eighty-eight feet was a straight line, whereas in fact there is a bend in the road, as described in the application, before reaching the termination of the second course, and a straight line from the bars to the termination of the second course would leave the *locus in quo* outside the road. But if the description in the application is deemed to be incorporated into the order, the two descriptions can be substantially reconciled. It would then appear that the distance of nine hundred and eighty-eight feet was not a straight line, and so as to the other discrepancies and uncertainties in the lines specified in the order. We are of opinion that the description in the application is the controlling one and determines the actual *locus* of the way. In laying out a private road, if the jury find in favor of laying out the road, the commissioners are bound to lay it out as described in the application, and have no discretion either to refuse to lay out the road, or to change

its location, or to depart in any respect from the road proposed by the applicants. They have no power to decide any thing, but perform simply the ministerial functions prescribed in the twelfth section of the act of 1853. That section is as follows: "The commissioners shall annex to such verdict (of the jury) the application mentioned in the first section of this act, and hand the same to the town clerk, who shall file the same, and the commissioner or commissioners shall lay out and make a record of said road, as described in the petition of the applicant." It is true that the road certified by the jury does not become a legal private road until the commissioners have performed the duty imposed by this section. That the verdict and application were duly filed is not questioned. The commissioners made an order laying out the road. The order declares that it was laid out pursuant to the application. The description in the order does not follow the language in the application. But this we conceive cannot be essential, provided the description in the application is incorporated into the order by reference, and the two descriptions are not irreconcilably repugnant. While on the one hand we recognize the importance of the rule that proceedings *in invitum* to divest an owner of his property ought to be carefully watched so that no injustice be done, on the other hand we cannot fail to recognize the importance of the public policy, sanctioned by constitutional provision, which requires that facilities be furnished for private ways, so that the property of citizens may be made accessible. This policy will be best promoted by a fair and reasonable, instead of a strained construction of the statute authorizing the laying out of private roads, and we are of opinion that there was no defect which invalidated the proceedings in this case.

The point that the road ran across the land of one Evans, who was not named in the application, or notified, and whose damages were not assessed, is not supported by the evidence taken in this proceeding, and the point was not raised on the trial. If the question was before us, it would we think admit of great doubt whether the plaintiff could allege a defect or omission in the proceedings, affecting the right of a third person,

Statement of case.

with whom he was not in privity, and who raises no question, and so far as appears makes no complaint.

We think the complaint was properly dismissed at the Circuit, and that the order of the General Term should be reversed and judgment entered for the defendant.

All concur.

Order reversed and judgment accordingly.

SAMUEL BILLINGS, Respondent, v. LESLIE W. RUSSELL et al.,
Impleaded, etc., Appellants.

The fact that a mortgage was given, or it seems that property was transferred, by a debtor for a valuable consideration, is not, as a proposition of law, inconsistent with the existence of an intent on the part of the debtor to defraud his creditors, or of such knowledge thereof, on the part of the mortgagee or purchaser as will avoid the mortgage or conveyance, and in this regard no distinction can be made between the consideration furnished by an existing debt and that arising in any other manner. When there is an actual intent to defraud, no form in which the transaction is put can shield the property transferred from the claim of creditors.

Proof, therefore, that a mortgage executed by an insolvent debtor was given to secure a debt actually owing by the mortgagor does not, as matter of law, disprove the existence of a fraudulent intent on the part of the debtor.

Auburn Ex. Bank v. Fitch (48 Barb. 344), *Archer v. O'Brien* (7 Hun, 146), *Jewett v. Noteware* (30 id. 192), *Bedell v. Chase* (34 N. Y. 886), distinguished.

Billings v. Billings (31 Hun, 65), reversed.

(Argued December 14, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made November 19, 1883, which reversed a judgment in favor of defendants, Russell & Sawyer, entered upon the report of a referee. (Reported below, 31 Hun, 65.)

This action was brought to foreclose a mortgage. Said defendants were judgment creditors of the mortgagor and defended on the ground that the mortgage was fraudulent and void as against the creditors of said mortgagor.

The facts so far as material are stated in the opinion.

101	226
124	387
136	500

Statement of case.

Leslie W. Russell for appellants. Where, upon appeal to the General Term from a judgment in an action tried by the court, the record does not contain the evidence, but the appeal is heard and determined solely upon the findings of fact and law, in order to succeed it is incumbent upon the appellant to show that the trial court could not, in any view of the facts found, properly order the judgment. (*Ag. Ins. Co. v. Barnard*, 96 N. Y. 525; *Van Tassel v. Wood*, 76 id. 614.) The question of fraudulent intent is one of fact. (2 R. S. 137, § 4; *Warner v. Blakeman*, 4 Keyes, 487.) A fraudulent contract like the one here cannot be used to defeat the judgment creditors of an insolvent. (*Stearns v. Gage*, 79 N. Y. 102, 107; *Parker v. Conner*, 93 id. 118, 128.) The debt for which the mortgage was given may be valid and remain, but the security attempted to be put ahead of the appellants' judgment cannot stand. (*Waterbury v. Sturtevant*, 8 Wend. 353, 361; *Garland v. Rives*, 4 Rand. 282; 15 Am. Dec. 756, 766, 767; *Lowry v. Pinson*, 2 Bailey's Law, 324; 23 Am. Dec. 140; *Shelley v. Boothe*, 73 Mo. 74; 39 Am. Rep. 481.)

C. A. Kellogg for respondent. If the property of a debtor is applied upon a *bona fide* debt the office of the statute is fulfilled, even if it be done with general design to hinder and delay other creditors, that not being the fraud contemplated. (*Auburn Ex. Bk. v. Fitch*, 48 Barb. 344; *Murphy v. Moore*, 23 Hun, 98; *Hale v. Stewart*, 7 id. 591; *Roeber v. Bowe*, 26 id. 557; *Waterbury v. Sturtevant*, 18 Wend. 353; *Jewett v. Noteware*, 30 Hun, 192; *Cowenhoven v. Hart*, 21 Penn. St. 495.) A debtor may prefer one creditor to another and such creditor may acquiesce in that preference. (*Archer v. O'Brien*, 7 Hun, 150; *Redell v. Chase*, 34 N. Y. 388.) The intent meant by the statute must be the intent on the debtor's part to keep from his creditors something they had a right to have applied on their debts. (*Hale v. Stewart*, 7 Hun, 591; *Archer v. O'Brien*, id. 150; *Auburn Ex. Bk. v. Fitch*, 48 Barb. 353, 355.) There could be no such intent in this case as the mortgage only applied the property to the security of a

Opinion of the Court, per RUGER, Ch. J.

bona fide debt and no more. (48 Barb. 344; 30 Hun, 192; Wait on Fraud. Cont. 513; 7 Hun, 591, 150; 40 id. 194; *Roeder v. Bowe*, 26 id. 557; *Seymore v. Wilson*, 19 N. Y. 421; *Weaver v. Barden*, 49 id. 300; 21 Penn. St. 495.) The debtor had a right to secure plaintiff and the latter had a right to allow him to remain on the premises as long as he pleased, as against his mortgage, and no other creditor could say he was injured by plaintiff's leniency. (48 Barb. 351.) Although the referee has characterized the mortgage as fraudulent and void, that does not change its essential character as made out by the other findings. (*Coleman v. Burr*, 93 N. Y. 17-31.) The referee's findings are inconsistent and those should be followed which are most favorable to the defeated party and others disregarded. (*Schwinger v. Raymond* 83 N. Y. 192; *Bonnell v. Griswold*, 89 id. 122.)

RUGER, Ch. J. Owing to the method in which this case is presented by the record, the question of fact discussed by the General Term, does not seem to have been properly before that tribunal. None of the evidence taken on the trial is contained in the error book, and the case was considered below, as it must be here, solely upon the facts found by the referee. It was, therefore, impossible for the General Term to review the case upon the facts, as they were not before it, and its order of reversal, must have been based upon assumed errors of law to which our right of review is necessarily confined. (*Case v. Phelps*, 39 N. Y. 164.) This limitation upon the right of review is further imposed by the language of the order of reversal which does not state, that it was based upon questions of fact. In such case the Code requires us to assume that the order was founded upon errors of law alone, and unless such errors are discovered in the findings of the referee the order of reversal cannot be sustained. (§ 1338, Code of Civil Pro.) The referee has found that the mortgage in suit was given by the mortgagor to secure a debt actually owing by him to the plaintiff, but "with the intent to hinder and delay his creditors, and for the purpose of placing the lands and premises

described in the complaint, beyond the reach of his said creditors, and securing the use and retaining the possession thereof as a home for himself and family," and that the same was received by the plaintiff "with the full knowledge of the aforesaid intent and purpose on the part of said George Billings, and with a like intent and purpose on his own part accepted and received said bond and mortgage." As a conclusion of law the referee found that said mortgage was "fraudulent and void as against the creditors of said George Billings."

The statute relating to fraudulent conveyances provides in express language, that every conveyance of any estate or interest in lands, made with intent to hinder, delay or defraud creditors, shall, as against such creditors, be void. It is further provided that in all cases arising under this statute the question of fraudulent intent "*shall be deemed a question of fact and not of law,*" and that it shall not be so construed as to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser, had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. (Tit. 3, chap. 7, part 2 of R. S.)

It thus appears that the finding of the referee is stated substantially in the language of the statute, and must be deemed conclusive as to the intent with which the mortgage was given, unless some controlling fact is also found, which nullifies it, and renders the conclusion of law predicated thereon, erroneous. It is inferable from the opinion of the court below that it supposed such a fact was discovered, in the finding that the mortgage was given for a valuable consideration. We are of the opinion, however, that the fact of the payment of a valuable consideration upon a transfer of property is not, as a proposition of law, inconsistent with the existence of an intent to defraud, and that in the application of this principle, no distinction can be made between the consideration furnished by an existing debt, or one arising in any other manner. It is undoubtedly evidence, and usually strong evidence, of the intent with which the conveyance is made, but is simply a circum-

Opinion of the Court, per RUGER, Ch. J.

stance to be considered by the court in determining the question of intent. The statute itself declares all conveyances made with a fraudulent intent absolutely void, except in the case of those made upon a good consideration and in ignorance on the part of the purchaser of the fraudulent design of his grantor. It contains, therefore, the strongest implication that the payment of a valuable consideration is not inconsistent with the existence of an intent to defraud, and of such knowledge on the part of the purchaser, of the fraudulent design, as will avoid a conveyance made to him, even though accompanied by the payment of an adequate consideration. The vice in the argument of the court below, if any there is, seems to be in its assumption, that the mere payment of a good consideration by the vendee, upon the transfer of property by an insolvent debtor, as matter of law disproves the existence of a fraudulent intent in such a transaction. It seems to us that this very case illustrates the error contained in such an assumption.

The debtor here was enabled by the inducement, held out to his creditor, in the offer to secure his debt, to obtain from him an assurance that the property mortgaged should be so held and protected by the mortgage from other creditors, as to enable the mortgagor to occupy and enjoy it for an indefinite time, for the benefit of himself and his family. Although the form of the transaction was that of security for a debt, its real object and design, was to so incumber the property by an apparent lien, as to mislead creditors and enable the debtor to possess and enjoy its beneficial fruits. The effect of the transaction was really to diminish the actual value of the security given, and enable the debtor to secure the difference, between the present value of a security payable in the future without interest, and the present value of the land mortgaged. This was property and justly belonged to the creditors of the insolvent debtor, but was practically withdrawn from them by the transaction.

It is argued, if the debtor retains any interest in the property mortgaged, that such interest is property, and can be reached by the creditor, and, therefore, he is not defrauded. It is possible that this might be so if the whole tran-

saction was made known, but the vice here is the imposition of a fictitious, because unenforceable incumbrance, equal to the entire value of the property mortgaged. It is no answer to such a transaction, to say that the same result could have been accomplished by lawful proceedings, taken by the voluntary action of the creditor. It was not so done, and whether it ever would have been accomplished in that way is purely a matter of conjecture. The continued possession of the premises by the debtor was here imposed as the condition of giving the security. Other situations can readily be conceived where the transfer of property, for a valuable consideration, may be made the cover for fraudulent practices. Exchanges by which one kind of property is converted into another more easily concealed or transported; the incumbrance of visible and unavailable property, and the retention of that which is convertible, or even the reverse of this, and other cases, where the aggregate value of the debtor's property is not diminished, but an apparent obstacle to a creditor's proceedings is created, are among the methods by which frauds may be perpetrated, by an insolvent debtor. Such transactions can be justified upon the reasoning of the court below, but they are in fact, fraudulent and condemned by the statute. (*Pettit v. Shepherd*, 5 Paige, 493, 501).

The cases cited by the General Term to sustain the position taken by it do not seem to us, to bear out the proposition advanced. The case of *Auburn Ex. Bank v. Fitch* (48 Barb. 344) was a review by the General Term upon questions of fact of the judgment of the trial court in favor of the plaintiff, and the reversal was based altogether upon alleged erroneous findings of fact. In *Archer v. O'Brien* (7 Hun, 146, 150), the question arose on exceptions to the charge of the trial judge, and the court there held that the debtor's vendee was entitled to a charge that "If he was a *bona fide* creditor and took a bill of sale as security for his debt, and had no notice of any fraudulent design on the part of the vendor, he was entitled to hold the property as against the other creditors of his vendor." The proposition of law contained in this request was undoubtedly

correct, but it affords no countenance to the doctrine that the *bona fides* of the debt alone is conclusive upon the question of a fraudulent intent. Even the case of *Jewett v. Noteware* (30 Hun, 192) is sustainable upon the ground that fraudulent intent would not be predicated of the facts, the only fraud found, being the intent on the part of one creditor, to get payment of his debt in preference to another, knowing that the debtor did not possess property sufficient to pay both. The report of the case does not show that there was any finding of fact that the mortgage there was given to defraud creditors, and therein it differs radically from the case at bar. In the case of *Bedell v. Chase* (34 N. Y. 386), the plaintiffs had purchased of an insolvent firm their stock of goods, and paid for them by their own notes, maturing at different periods in the future. It was left to the jury upon an unexceptional charge, to say whether the transaction was fraudulent or not, and they found as a question of fact that it was an honest purchase, and this finding was sustained by the court on appeal.

We have thus briefly referred to the cases cited in the court below, and do not find in them authority for the proposition claimed. The authorities, aside from the statute itself, holding a contrary proposition, are quite numerous, and cannot, within reasonable limits, be either all referred to, or extensively quoted from.

Wait on Fraudulent Conveyances, § 208, says: "If the alienation is effected with a mutual design to hinder, delay or defraud creditors, the presence even of the most bounteous or adequate consideration will not save or cure it." "It is not sufficient that it be upon good consideration or *bona fides*, it must be both," citing many cases. (Kerr on Frauds, 199.) May on Fraudulent Conveyances, 233, says: "*Mala fides* supersedes all inquiry into the consideration, but *bona fides* alone is not always sufficient to support a transaction not founded on any valuable consideration." Senator EDWARDS, delivering the opinion of the Court of Errors in *Waterbury v. Sturtevant* (18 Wend. 354), said: "This, therefore, appears to be a case between a debtor and a *bona fide* creditor in which the former has preferred the latter to his other creditors, and

if simply a case of this description *unaffected with fraud*, the conveyance must be considered legal and valid." The case of *Blennerhassett v. Sherman* (105 U. S. 117), was where a mortgage was also given to secure a *bona fide* debt, and yet it was held by the court that, having been given for the purpose of facilitating the commission of a fraud by the mortgagor upon his other creditors, it was void. The frequent case of a mortgage of chattels for a *bona fide* debt where the mortgagor is permitted to remain in possession of the property, and dispose of it, is an illustration of the rule that a fraudulent purpose may be covered by a conveyance given to secure a *bona fide* debt. A conveyance to a creditor of property sufficient to pay his full debt, upon condition that he will give a portion to the grantor's wife, was held to be fraudulent in *Kissam v. Edmonston* (1 Iredell's Eq. 180). It was said by Judge EARL, in *Starin v. Kelly* (88 N. Y. 421), that "under the statute a creditor assailing a transfer of property as fraudulent may succeed by simply showing a fraudulent intent on the part of the vendor, or such intent on the part of the vendee. If, however, the vendee shows that he paid a valuable consideration for the property transferred to him, the proof of the fraudulent intent of the vendor only, is not sufficient; then there must be proof also of a fraudulent intent on the part of the vendee, or that he had notice of the vendor's fraudulent intent." In *Syracuse Chilled Plow Co. v. Wing* (85 N. Y. 421, 426), this court, Judge RAPALLO writing the opinion, distinctly recognized the principle that a mortgage, though given for a just debt, might be assailed as fraudulent, and held that the question as to the intent with which it was given, was purely one of fact. (See, also, *Kimball v. Thompson*, 4 Cush. 441; *Gragg v. Martin*, 12 Allen, 498; *Bradley v. Ragsdale*, 64 Ala. 553, 559.) It was held in *Schmidt v. Opie* (33 N. J. Eq. 141) that if a mortgage be given for a fraudulent purpose, even though for an honest debt, and the mortgagee was cognizant of the mortgagor's purpose, it is fraudulent as against creditors. Similar authorities are found in *Garland v. Rives* (4 Randolph, 282), *Lowry v. Pinson* (2 Bailey's Law, 324), *Shelley v. Boothe* (73 Mo. 74).

Statement of case.

From this review of the authorities it seems clear that, where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claims of creditors, even though a full and adequate consideration be received for the same.

The order of the General Term should, therefore, be reversed and the judgment entered on the report of the referee affirmed.

All concur.

Order reversed and judgment affirmed.

HENRY HILDRETH, Respondent, v. THE CITY OF TROY, Appellant.

The rejection of a competent juror is ground of error, although the jurors who actually try the case are competent, it is the right of a party to require that the range of selection shall not be limited by excluding without cause a competent juror from the panel.

By defendant's charter (§ 16, chap. 1, Laws of 1816), it is declared that in an action to which the city is a party "no person shall be deemed an incompetent juror by reason of his being an inhabitant * * * of the said city." In an action against the city, upon impaneling the jury the plaintiff "excused" eight jurors, drawn from the regular panel, who were inhabitants of the city, on the ground that they were interested. Defendant's attorney objected. The court overruled the objection, holding that all such jurors were disqualified, to which ruling said attorney excepted. Afterward six other jurors were rejected on the same ground. *Held*, that the ruling was error which was available to defendant on appeal (Code of Civ. Pro., § 1180); that the proceeding on the part of the plaintiff was in substance a challenge, and that the ruling in substance gave plaintiff fourteen peremptory challenges instead of the two to which he was entitled.

Freery v. People (2 Keyes, 425), *Ferris v. People* (35 N. Y. 125), *People v. Ransom* (7 Wend. 417), distinguished.

(Argued December 15, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an

101	234
110	306
101	234
121	116

101	234
157	191

Opinion of the Court, per ANDREWS, J.

order made November 20, 1883, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

William J. Roche for appellant. The trial judge erred in excluding, from the jurors drawn for said trial, jurors who at the time resided in Troy. (Laws 1816, chap. 1, § 16; Laws 1870, chap. 598; Laws 1873, chap. 427; Code of Civ. Pro., § 1180; *State of Missouri v. Home*, 54 Mo. 453.) The courts of the United States are bound to take judicial notice of the laws of the several States in the same manner as of the laws of the United States. (*Evans v. C. & P. R. R. Co.*, 5 Phila. 512; *Lyell v. Lapeer Co.*, 6 McLean, 443; *Fauntleroy v. Hannibal*, 1 Dill. [Mo.] 118; *People v. Breeze*, 7 Cow. 429; *Chapman v. Wilber*, 6 Hill, 475; *People v. Herkimer*, 4 Cow. 345.)

James Lansing for respondent. It was not error to exclude the jurors drawn from the city of Troy. (12 Coke, 114; Coke on Litt. 157 a and b; *Diveny v. City of Elmira*, 51 N. Y. 506; Laws of 1816, chap. 1, § 16; Code, § 1166; *Potter v. Ellice*, 48 N. Y. 321.) If, after the rejection of a juror against objection, another is found with whom both parties declare themselves satisfied, error in the rejection is not available. (*Grand Rapids, etc., v. Jarvis*, 30 Mich. 303.) After a trial by an impartial jury, the fact that others called as jurors, who were equally competent but not more so, were excluded from the jury, is not ground for a new trial. (*Tweed v. Davis*, 1 Hun, 252; *People v. Jewett*, 3 Wend. 314; *Muller v. Decker*, 19 Weekly Dig. 427.)

ANDREWS, J. This action was brought to recover for injuries sustained by the plaintiff from the negligence of the defendant in failing to keep Congress street in the city of Troy in safe condition for travel, and resulted in a verdict for the plaintiff for \$1,800. It appears that upon the impanel-

ing of the jury, the plaintiff "excused" eight jurors drawn from the regular panel, residents of the city of Troy, upon the ground that they were interested in the result of the action, to which proceeding the city attorney objected on the ground that residents and tax payers of the city are not disqualified as jurors in city cases, if otherwise competent. The court overruled the objection and held that all such jurors were disqualified, to which ruling the attorney for the defendant excepted. Thereafter four additional jurors, residents of the city, were drawn and the same proceeding was had, and they were likewise excluded. The jury box was filled from other names in the panel, and none of the jurors who sat were objected to or challenged. It is not claimed that the jurors excluded by the ruling of the court were interested except as tax payers of the city. By the rule of the common law the inhabitants of a municipality, or the members of any body politic, were incompetent to sit as jurors in a case in which the corporation was a party. They were deemed to be interested, and such interest was a good cause of principal challenge. (Coke upon Littleton, 157, a, b.) The common law has been modified in this State by general statutes making the inhabitants of a town or county competent jurors in suits brought by or against such town or county (1 R. S. 357, § 4; id. 384, § 4; 2 id. 420, § 58), and as to the inhabitants of cities, by special provision, inserted in nearly all cases, in the charters of incorporation. The charter of Troy, enacted in 1816, provides: "That upon the trial of any issue, or upon the taking or making of any inquisition, or upon the judicial investigation of any facts whatever, to which issue, inquest or investigation the mayor, recorder, aldermen and commonalty of said city are a party, or in which they are interested, no person shall be deemed an incompetent juror by reason of his being an inhabitant, freeholder or freeman of the said city." (Chap. 1, § 16, Laws of 1816.) This provision has never been repealed or amended, and was in force at the time of the trial of this action. The ruling of the learned trial judge excluding from the jury the residents of Troy on the ground of interest, was

Opinion of the Court, per ANDREWS, J.

in contravention of this explicit provision of law and was plainly erroneous.

The question presented is, whether the error of the judge is ground for the reversal of the judgment. The proceeding on the part of the plaintiff was in substance a challenge. It was so treated by the attorney for the city and by the court. The court ruled that residents of the city were legally disqualified as jurors, and excluded them on that ground alone. The right of a party to except to a determination of the court upon a challenge to a juror, and to have such determination reviewed on appeal is expressly given by the Code (§ 1180). This section recognizes the determination of a challenge as involving a legal right, which may be reviewed and, if erroneous, set aside. The General Term disposed of the question on the ground that the rejection of a competent juror was not ground of error, where the jurors who actually try the case are competent. We cannot assent to this view. In our judgment the adoption of this principle would seriously imperil the system of jury trial and lead to practices which the statutes regulating the drawing of jurors were designed to prevent. The main purpose of the statutes for the drawing and selection of trial jurors is the securing of a fair and impartial jury. To this end, provisions are made, which, if followed, prevent the selection of a jury either by the court, or the officers of the court, or by either of the parties to the action, and exclude from the jury box all jurors not indifferent, or who for any reason are disqualified to act as jurors; while at the same time they secure to the parties the advantage of a jury constituted by lot from all the qualified jurors undrawn on the panel. By the Stat. 3 Geo. II, § 11, "for the better regulation of juries," it is provided that the first twelve persons drawn, and appearing, and approved as indifferent, should be the jury to try the cause. This provision was incorporated into the Revised Laws of 1813 (1 R. L. 331, § 20), and into the Revised Statutes (2 R. S. 420, § 61), and was re-enacted in the Code of Civil Procedure (§ 1166), without any substantial change. The section of the Code is in this language: "The first twelve

Opinion of the Court, per ANDREWS, J.

persons who appear as their names are drawn, and called, and approved as indifferent between the parties, and not discharged or excused, must be sworn ; and constitute the jury to try the case." Sections 1032 and 1033 enumerate causes for which jurors may be discharged or excused. The language of section 1166 is mandatory. Blackstone refers with just admiration to the safeguards thrown around the selection of a jury by the English statutes, and observes that they are admirably designed for the avoiding of frauds and secret management, by electing the twelve jurors out of the whole of the panel by lot. (2 Bl. Com. 365.) It is said that no injury resulted to the defendant from the erroneous exclusion of the city jurors, since a competent jury actually tried the case. The court cannot say that the trial would have resulted differently if the city jurors had not been excluded. On the other hand the contrary cannot be affirmed. It is certain that except for the erroneous ruling the jury would have been differently constituted. Jurors differ in intelligence, judgment, and fitness to act as jurors. It is we think the legal right of a party to have the jury selected from the competent names in the jury box, and that the range of selection shall not be limited by excluding without cause competent jurors from the panel. It cannot be doubted that if an incompetent juror had been admitted against the objection of the defendant, the judgment would be set aside, and yet in many cases it would be impossible to show any actual injury. A person not a resident of the county, or over sixty years of age, or without the requisite property qualification, is not a competent juror (Code, § 1027), but it would we conceive be no answer to an exception taken to his admission, that no actual injury was shown to have resulted. The violation of the legal right of the party to have the case tried by competent jurors, would be conclusive. The error in this case was in improperly rejecting competent jurors. The court added a disqualification, not only not found in the statute, but which the statute declares shall not constitute a disqualification. The law allows in a civil case two peremptory challenges to each party. The action of the court was equivalent to allowing the plaintiff fourteen peremp-

Opinion of the Court, per ANDREWS, J.

tory challenges, because it excluded from the jury without adequate cause upon the motion of plaintiff, fourteen jurors presumably competent. If the court had in form allowed the plaintiff more than two peremptory challenges, would it be an answer to an exception, that nevertheless there was no legal injury, since a competent jury was subsequently impaneled? We think the error of the court in excluding the city jurors is available to the defendant on this appeal. The learned trial judge doubtless decided the point under the misapprehension that the case was governed by the common law, without having in view the statute of 1816. But the charter is declared on its face to be a public act, and the judge is presumed to have had notice of its provisions. It does not appear whether his attention was specially called to the provision in section 16, but the counsel for the plaintiff took the objection to the jurors specifically on the ground that as residents of Troy they were interested, and so disqualified, and the defendant's counsel insisted that they were not disqualified for that reason, and the court ruled the point for the plaintiff. We think he must bear the consequences of the error, and that he cannot escape by charging the defendant with a violation of duty in omitting to call the attention of the court to the provision of the statute of 1816, which, so far as appears, may not have been known to him at the time. The judgment should be reversed. The statute makes elaborate provision for securing an impartial jury. It provides that the first twelve competent jurors drawn, who are indifferent and not discharged or excused, shall constitute the jury. The law prescribes the qualifications of jurors. The court cannot add to, or detract from them. It cannot itself select the jury, directly or indirectly. It cannot in its discretion, or capriciously, set aside jurors as incompetent, whom the law declares are competent, and thus limit the selection of the jury to jurors whose names may be left. If this is done, a legal right is violated, for which an appellate court will give redress. The jury system, to be successfully administered, requires not only absolute impartiality in fact, in the drawing of jurors, but such an adherence to forms and methods of pro-

Statement of case.

cedure as will secure public confidence and prevent any suspicion of improper or unfair dealing.

We have not lost sight of the cases holding that a mere irregularity on the part of ministerial officers in the selection and drawing of jurors is not ground of error, unless it appears that it operated to the prejudice of the party. (*Friery v. People*, 2 Keyes, 424, 425; *Ferris v. People*, 35 N. Y. 125; *People v. Ransom*, 7 Wend. 417.) But the erroneous exclusion by a judge on the trial from a particular panel; of a class of persons regularly drawn, on the ground of incompetency, stands, we think, upon a different principle and is governed by different considerations.

The judgment should be reversed.

All concur.

Judgment reversed.

FRANCIS BRUECHER, Respondent, v. THE VILLAGE OF PORT
CHESTER, Appellant.

Where an assessment for a local improvement is valid upon its face, but is in fact void because the assessors had no jurisdiction to impose it, an action may be maintained to recover back money involuntarily paid in satisfaction thereof without first having the assessment set aside or vacated.

Payment to an officer who has a valid warrant for the collection of such an assessment and who threatens to execute the same is not a voluntary payment.

No demand for a return of the money so paid is necessary before the commencement of an action to recover the same.

(Argued December 15, 1895; decided January 19, 1896.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made the first Monday of March, 1893, which reversed a judgment in favor of defendant, entered upon an order sustaining a demurrer to plaintiff's complaint, and which overruled the demurrer. (Reported below, 31 Hun, 550.)

The substance of the complaint is set forth in the opinion.

101	240
111	336
101	240
119	590
101	240
120	189
120	306
101	240
122	609
101	240
125	639
101	24
130	405
101	240
125	463
101	240
144	498
101	240
151	18
101	240
153	340

Statement of case.

David B. Ogden and *Charles W. Sloane* for appellant. The payment by plaintiff in 1875, being a voluntary payment of an assessment void on its face, the action to recover the amount paid cannot be maintained. (*Merritt v. Village*, 71 N.Y. 309; *N. Y. & H. R. R. Co. v. Marsh*, 12 id. 308, 312; *Fleetwood v. City*, 2 Sandf. 475, 482; *Peyser v. Mayor, etc.*, 70 N. Y. 497, 502; *Bank of Commonwealth v. Mayor, etc.*, 43 id. 184, 188, 189; *Horn v. Town of New Lots*, 83 id. 100; *Newman v. Supervisors*, 45 id. 676; *Natl City Bank v. City*, 53 id. 49; *Crooke v. Andrews*, 40 id. 547, 549; *Stuart v. Palmer*, 74 id. 183; *Whitney v. Thomas*, 23 id. 281; *Chase v. Chase*, 95 id. 373; *Lott v. Swezey*, 29 Barb. 87-92; *Rumsey v. City*, 97 N. Y. 114, 119; *Moore v. City*, 98 id. 396; *Strasburgh v. Mayor, etc.*, 87 id. 452.) Plaintiff paid the assessment in order to complete the conveyance although he knew of its invalidity and paid it under protest; such a payment made for such a purpose is voluntary and cannot be recovered back. (*N. Y. & H. R. R. Co. v. Marsh*, 12 N. Y. 308; *B. & S. Glass Co. v. City*, 4 Metc. 187; *Pumpelly v. Phelps*, 40 N. Y. 59; *Mack v. Patchen*, 42 id. 167; *Cockcroft v. N. Y. & H. R. R. Co.*, 69 id. 201.) The void assessment did not constitute a lien on plaintiff's property within the meaning of his covenant against incumbrance. (*Chase v. Chase*, 95 N. Y. 374; *In re Deering*, 85 id. 1; *In re Delancey*, 52 id. 80; *Purcell v. Mayor, etc.*, 85 id. 330.) The payment was not made under duress. (*Shaw v. Woodcock*, 7 B. & C. 73; *Harmony v. Bingham*, 12 N. Y. 99; *Astley v. Reynolds*, 2 Strange, 915; *Smith v. Bromley*, 2 Doug. 696; *Hall v. Schultz*, 4 Johns. 240; *Chase v. Drival*, 7 Greenl. 134.) The complaint is defective in that it does not allege a demand on and refusal by defendant for the repayment of the money paid. (*Abbott v. Draper*, 4 Den. 51; *Mayor, etc., v. Erben*, 38 N. Y. 305; *Stevens v. Hyde*, 32 Barb. 171; *Scholey v. Halsey*, 72 N. Y. 578-582.) The treasurer is not authorized to receive payments under any conditions whatsoever, and any such receipt was unavailing as regards defendant's rights. (*Commercial Bk. of Rochester v. City*, 42 Barb. 488.) A protest will not change a voluntary into an involuntary pay-

ment. The payment nullifies the protest. (*Fleetwood v. City*, 2 Sandf. 475, 482; *Trinity Church v. Mayor, etc.*, 10 How. 138.)

I. T. Williams for respondent. It was not necessary to have the assessment set aside or vacated, it being illegal, void and of no effect by reason of a failure to comply with the statute. (*People v. Connor*, 46 Barb. 333; *State v. Mayor, etc.*, 38 N. J. L. 85; *State v. City of Perth Amboy*, id. 425; *Wilkes v. Mayor, etc.*, 79 N. Y. 621; *Stewart v. Palmer*, 74 id. 183; *Swift v. City of Poughkeepsie*, 37 id. 511; *Bank of Commonwealth v. Mayor, etc.*, 43 id. 184; 71 id. 312; *Horn v. Town of New Lots*, 83 id. 100.) To constitute a voluntary payment within the rule that a voluntary payment cannot be recovered back, it must be made with full knowledge of all the material facts. (*Duke v. Artisans' Bank*, 3 Abb. Ct. App. Dec. 10.) Payment to prevent a sale has always been held to be an involuntary payment, within the rule of law under view. (*Harmony v. Brigham*, 12 N. Y. 99-116; 2 Strange, 915; 3 Doug. 695; 4 Johns. 240; 1 Esp. 84; 2 id. 722; 7 Barn. & Cres. 73; 3 Mees. & Wels. 644; 7 Greenl. 134; 2 Sandf. 475; 9 Johns. 201, 370; 7 Mass. 14; *Bates v. N. Y. Ins. Co.*, 3 Johns. Cas. 238; *Am. Ex. Fire Ins. Co. v. Button*, 8 Bosw. 148; 3 How. Pr. 102; 18 Wend. 586; 9 Johns. 301, 370; 2 E. D. Smith, 224; 4 Cow. 454.) The rule that a voluntary payment cannot be recovered back is intended solely for the protection of the party receiving the money, and it is competent for him to waive the benefit of the rule. (*Com. Bank of Rochester v. City of Rochester*, 22 Barb. 488.)

EARL, J. The plaintiff in his complaint alleged that in 1875 he owned certain lands situated in the village of Port Chester, and that they were assessed for certain local improvements; that the commissioners of estimate and assessment appointed under the defendant's charter to apportion and assess the expenses of the improvement upon the adjacent premises did not take the oath required by the charter to be taken by them, nor

Opinion of the Court, per EARL, J.

did they, after making their estimate and assessment, publish a notice of the time and place when and where interested parties could be heard in manner and form as required by the charter, whereby, and by means of such omissions, the report of the commissioners and the confirmation thereof, and the assessment upon his lands were illegal and wholly void at law; and he further alleged that the defendant was estopped from denying that the assessment was totally void in law, for the reason that, since the payment of the assessment, the defendant was impleaded by one Sarah Merritt and others in an action presenting the same identical issues and question presented in this action, wherein it was adjudged that the assessment was utterly void for the reasons and upon the grounds above stated. (*Merritt v. The Village of Port Chester*, 71 N. Y. 309.) And he further alleged that on the 27th day of February, 1875, a warrant was issued for the collection of the assessment upon his premises, and the defendant by virtue thereof threatened to sell and was about to sell his premises for the payment of the assessment, and that he, having before that time sold his premises and being under contract to convey the same free from all incumbrances, was unable to do so by reason of the assessment, which was an apparent lien and cloud upon the premises, and thus he was compelled, in order to complete the conveyance of his premises, to pay and did pay to the treasurer of the village and into the treasury thereof the sum of \$489.30 under protest, nevertheless, and the same was received by the treasurer and into the village treasury, as so paid under protest, to-wit: that the said assessment was utterly void and of no effect, and that all the rights of the plaintiff should be and remain reserved to him, and in no way waived, foregone, or pretermitted by such payment; and he demanded judgment for the sum so paid and interest. To the complaint the defendant demurred on the ground that it appeared upon the face of the complaint that it did not state facts sufficient to constitute a cause of action.

It does not appear from any thing alleged in the complaint that this assessment was invalid upon its face, or that its invalidity would appear in any proceeding taken to enforce it.

Opinion of the Court, per EARL, J.

The contrary must have been determined in the case of *Merritt v. Village of Port Chester*; but it is distinctly alleged in the complaint, and was decided in this court in that case, that the assessment was in fact utterly illegal and void. Hence it was not necessary for the plaintiff to institute any action or proceeding to vacate the assessment and thus have it annulled and set aside before commencing this action. If the assessment had been merely irregular, informal or unjust, the assessors having jurisdiction to impose the same, then, before an action to recover back the money paid in satisfaction thereof could be maintained, it would have been necessary to have the same vacated or annulled in some way and thus removed as an obstacle out of the way. But where an assessment is in fact utterly void on the ground that the assessors had no jurisdiction to impose the same, then an action may be maintained to recover back money paid in satisfaction thereof without first having the assessment set aside or vacated. And so it has been held. (*Newman v. Supervisors of Livingston Co.*, 45 N. Y. 676; *Strusburgh v. Mayor, etc.*, 87 id. 452; *Horn v. New Lots*, 83 id. 100.)

These rules in reference to money paid upon assessments were established from the analogy which was supposed to exist between completed assessments and judgments. Money paid upon a judgment which is merely irregular or erroneous cannot be recovered back while the judgment remains in force. But money involuntarily paid upon a judgment which is utterly void can be recovered back without first causing the judgment to be reversed or vacated.

This was not a voluntary payment by the plaintiff within the rules of law applicable to such payments. We must assume that the assessment was valid upon its face, and that a valid warrant was out for its collection; and it has been repeatedly held that payment to an officer who has a valid process which he can enforce and which he threatens to execute is not a voluntary payment. (*Peyser v. Mayor, etc.*, 70 N. Y. 497.) And the money having been taken from the plaintiff wrongfully

Statement of case.

and the defendant having no right to retain the same, no demand prior to the commencement of the action was necessary.

We are, therefore, of the opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE, ex rel. HARVEY M. MUNSELL, Respondent, v.
THE COURT OF OYER AND TERMINER OF THE COUNTY OF NEW
YORK, Appellant.

An act which is not a civil or private contempt, and is not enumerated among criminal contempts (Code of Civ. Pro., § 8), is not a contempt, although it may be punishable as a misdemeanor.

During the progress of the trial of an indictment for assault with intent to kill, one of the jurors went to the scene of the affray for the purpose of acquainting himself with the locality. For this act he was adjudged by the court guilty of contempt, and was committed therefor. *Held* error. The distinction between private or civil and public or criminal contempts pointed out.

(Argued December 16, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made May 29, 1885, which reversed on *certiorari* an order of the Court of Oyer and Terminer of the county of New York, sentencing the relator to imprisonment for thirty days and to pay a fine of \$250. (Reported below, 36 Hun, 277.)

The relator was a juror on the trial of an indictment for assault with intent to kill. During the progress of the trial he went alone to the scene of the affray for the purpose of acquainting himself with the locality. After the trial was closed proceedings were instituted against the relator by attachment to punish him for contempt of court, and in such proceedings the order in question was made.

De Lancey Nicoll for appellant. The relator's misconduct tended to impair, impede and prejudice the rights or remedies

101	245
118	481
101	245
143	308
101	245
156	295
156	299
101	245
162	442
101	245
164	475

Statement of case.

of the people, one of the parties to the action; the Court of Oyer and Terminer had jurisdiction and power to punish him therefor as for a contempt of court. (Code, § 114, subd. 8; *Hull v. L' Eplattimer*, 49 How. Pr. 500; 5 Daly, 534; *Deces v. Merle*, 2 Paige, 495; *Riggs v. Whitney*, 15 Abb. 388; 6 Wait's Pr. 134-136; *Middlebrook v. State*, 43 Conn. 267; *People v. Wilson*, 64 Ill. 195; *Whitton v. State*, 36 Ind. 212; *Arnold v. Comm.*, 44 Am. Rep. 480; *Tyler v. Hammersley*, 44 Conn. 393; *State v. Morrill*, 16 Ark. 384.) The misconduct of jurors has been repeatedly treated as a contempt and punished as such. (*State v. Helverston*, R. M. Charl. [Ga.] 48; *Burrill v. Phillips*, 1 Gall. [U. S.] 360; *Alexander v. Dunn*, 5 Ind. 122; *Milo v. Gardner*, 41 Me. 549; *Oram v. Bishop*, 7 Halst. [N. J. L.] 153; *State v. Doty*, 3 Vroom [N. J.], 403; *United States v. Devaughan*, 3 Cranch, 84; *Ex parte McAnnally*, 7 U. P. Charl. [Ga.] 310; *Offutt v. Parrott*, 1 Cranch, 154.) The common-law powers of the criminal courts to punish *quasi* civil contempt, that is, all contempts which tend to prejudice the people or the prisoner, and which are not strictly criminal, have not been taken away by legislative enactment, but have been expressly and in direct terms retained and conferred. (2 R. S. [Edm. ed.] 759, § 14; Penal Code, § 724; Code of Crim. Pro., §§ 243, 350, 619, 635.) The cases fully recognize both the inherent common-law power and the express statutory power quoted from the Revised Statutes. (*People, ex rel. v. Fancker*, 2 Hun, 226, 231-233; *In re Hahn*, 87 N. Y. 521.) A defendant is entitled to a new trial where a juror has received any evidence out of court other than that resulting from a view as provided in section 411 of the Code. (Code of Civ. Pro., § 465, subd. 2.) The Court of Oyer and Terminer erred only in the supposition that its power was limited to an imprisonment of thirty days. (Code of Civ. Pro., § 2285.)

John Vincent and *Ira Shafer* for respondent. It was error to adjudge the relator guilty of contempt. (Code of Civ. Pro., §§ 8, 10-15, 192, 3343; Penal Code, §§ 143, 73.) The Oyer

Opinion of the Court, per FINCH, J.

and Terminer and not the people is affected by the relator's discharge. (*People, ex rel. v. Gilmore*, 88 N. Y. 626.)

FINCH, J. The occasion and result of proceedings for contempt furnish a clear and well-defined line of division separating them into two classes which have become somewhat mingled and confused by the use of a fixed but ambiguous nomenclature. (*In re Watson*, 3 Lans. 408.) There may prove to be rare and exceptional cases which do not easily fall within either class, or some which so commingle the characteristics of both as to make their location doubtful and difficult; but in the main the division is exhaustive and clear. In one class are grouped cases whose occasion is an injury or wrong done to a party who is a suitor before the court, and has established a claim upon its protection; and which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit. In these cases the authority of the court is indeed vindicated, but it is, after a manner, lent to the suitor for his safety, and vindicated for his sole benefit. The authority is exerted in his behalf as a private individual, and the fine imposed is measured by his loss and goes to him as indemnity; and imprisonment, if ordered, is awarded, not as a punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled which are essential to his particular rights of person or of property. This clearly appears from the mode of enforcing the suitor's remedy prescribed by the statute. (Code of Civ. Pro., §§ 2284, 2285.) A fine may be imposed to indemnify his actual loss. Where such is not shown the fine must not exceed his costs and expenses and \$250 in addition thereto, and in both cases be paid over to the suitor. The imprisonment, where the act or duty can yet be performed, must end with the performance of the act and payment of the fine; but if the act or duty cannot be performed, then the imprisonment must not exceed six months and until the fine be paid. In this last provision there is a trace of the element of punishment, but it is for the violation of the private right of the party and to check similar violations in the future, and has no respect to public offenses or the vindication of public

wrongs. The people may be such a party, but only when, like individuals, they are seeking a civil right or remedy which the misconduct complained of tends to defeat or impede; in other words, when they stand in the attitude of private suitors, seeking to enforce their private rights. If in this class of cases there exist traces of a vindication of public authority they are but faint, and utterly lost in the characteristic which is strongly predominant of protection to private rights imperiled or indemnity for such rights defeated.

These cases have been usually described as proceedings for the enforcement of civil remedies, and more briefly as civil contempts; and because the great volume of instances occur in the progress of civil actions; but they may also occur in criminal actions or proceedings, as we shall presently see, and constitute then what I imagine the learned counsel for the appellant had in his mind when he spoke of "*quasi* civil contempts." If we describe this first class of contempts as private contempts because their occasion and result is, primarily and in the main, the vindication of private rights, we shall avoid confusion or misapprehension.

The second class of contempts consists of those whose cause and result are a violation of the rights of the public as represented by their constituted legal tribunals, and a punishment for the wrong in the interest of public justice, and not in the interest of an individual litigant. In these cases if a fine is imposed its maximum is limited by a fixed general law, and not at all by the needs of individuals; and its proceeds when collected go into the public treasury and not into the purse of an individual suitor. The fine is punishment rather than indemnity, and if imprisonment is added, it is in the interest of public justice and purely as a penalty, and not at all as a means of securing indemnity to an individual. Necessarily these contempts in their origin and punishment partake of the nature of crimes, which are violations of the public law, and end in the vindication of public justice; and hence are named criminal contempts. As described in the statute, an element of willfulness, or of evil intention enters into and characterizes

them. They are a disturbance of the court which interferes with its performance of duty as a judicial tribunal; willful disobedience to its lawful mandate; resistance to such mandate willfully offered; contumacious and unlawful refusal to be sworn as a witness, or to answer a proper question; and publication of a false and grossly inaccurate report of its proceedings. These cases and their punishment are placed under the head of "general powers of the courts and their attributes;" and they very evidently relate to public offenses tending to cast discredit upon the administration of public justice, and having no reference to the particular rights of suitors. But here again we find that they occur as well in civil as in criminal actions, and so, for convenience, we may speak of them in view of the present classification, as public contempts, although the established legal nomenclature must remain unchanged.

We have then two distinct classes, private contempts and public contempts, with which we are to deal for the purposes of this case. Both were known to and recognized by the common law, and the courts were held to possess an inherent power of punishing by process of contempt any disregard of their authority, both for the benefit of their suitors, and for the protection of their own order and dignity. Necessarily the common-law power was very broad and vested large discretion in the courts. These became in some instances both accuser and judge, and this was especially so where the contempt was of a public nature, and no private person stood as complainant and sufferer. When the Revised Statutes were enacted an evident effort was made to codify the law of contempt and bring it within definite and fixed rules (1 R. S. 534, § 1; *id.* 278, § 10); and the effort plainly recognized the difference between the two classes. The first, or private contempts, were described as those "by which the rights or remedies of a party in a cause or matter depending in such court may be defeated, impaired, impeded or prejudiced in the following cases." After a very careful and specific enumeration it was still recognized that in the multitude of private rights other and unnamed cases might

occur, and to meet that emergency subdivision 8 was added which retained the power in "all other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record to enforce the civil remedies of any party to a suit in such court or to protect the rights of any such party." By this clause the common-law right as to private contempts was preserved outside of and beyond the statute enumeration, and this was deemed safe and prudent because in cases affecting only private rights and wrongs done merely to the suitor the courts would be under little or no temptation to unduly strain or exercise their power. But the situation was entirely different as to public contempts. As to these the court contemned was the court which adjudged and punished, and that summarily and without the intervention of a jury. Here precise limitations were needed, and any shred or remnant of undefined common-law power was deemed dangerous. And so the legislature decreed that "every court of record shall have power to punish as for a criminal contempt persons guilty of either of the following acts *and no others.*" Observe the difference in the two acts founded upon the inherent difference between the two classes. The private or civil contempt might go beyond the statutory enumeration and include also what was usual or permissible at common law. But the public or criminal contempt was precisely defined and barred in by the statute enumeration. The phrase "and no others" implies that there were or might be other and non-enumerated offenses, answering the description or characteristics of public contempts, which, but for the statute, might be so deemed and punished; and all these it was affirmatively intended to shut out, at least until subsequent legislation should let them in. So that, for the criminal contempt, we may look only to the statute, while for the private or civil contempt we may resort, if need be, to the common law. These two statutes have been substantially copied into our Codes (Code of Civ. Pro., §§ 8, 14; Penal Code, § 143). Outside of the criminal contempts enumerated there were very many offenses of that general character which could not be so punished, but

were reached by making them misdemeanors and giving the culprit a trial before a jury; and any omitted case not covered by one or the other of these remedies may be easily met by further legislation. Other provisions of the Codes, to which we have been referred, may have been enacted without keeping this classification in view, but, if some confuse, none of them destroy it. By section 243 of the Code of Criminal Procedure a grand juror may be challenged as a minor, an alien or insane, or as prejudiced and not impartial toward the party challenging, and by section 243 his attempt to serve is punishable as a contempt. It is not called a criminal or public contempt, and is not made such, but in its nature was evidently deemed an act which rather violated the private or particular right of the party challenging, and so belonged as it was left by the Code in the class of private contempts occurring in a criminal action. By section 344 and those which follow a prisoner may apply to remove his case from a court in which the indictment is pending, and for that purpose may apply to a judge for a stay, but if the application is denied, a further appeal to another judge is forbidden and made punishable as a contempt. Here again the prohibited act respects primarily the private right of the accused, and is classed as a simple contempt and not denominated criminal. But since it does also respect public justice, and there is no suitor to be indemnified, it hardly belongs where it is placed, and some consciousness of this is evidenced by the further provision of the section that it shall also be punished as a misdemeanor. Section 619 makes disobedience to a subpoena, or refusal to be sworn or testify, a criminal contempt, and section 635 extends that to a conditional examination.

It seems to me thus entirely clear that an act which is not a private contempt, and is not enumerated among criminal contempts, is not a contempt at all, although it may be and very often is punishable as a misdemeanor. There is no difficulty about the statute (2 R. S. [Edm. ed.] 759, § 14) to which the learned district attorney refers us, as making all contempts in civil cases applicable to criminal trials. The private contempts

are so applicable when they in fact occur. The statute in question accomplished nothing except to make the form and manner of proceeding adopted to punish contempts in civil cases, apply to contempts on criminal trials, so far as in their nature applicable. It did not change the definition of contempts or destroy or confuse the statute classification. (*People v. Restell*, 3 Hill, 289, 295.) The extended application of the statute was intimated in *People v. Hackley* (24 N. Y. 74, 78), but the essential characteristics of contempts were not confused or altered.

There remains to us the inquiry whether the act of the juror in this case was a contempt at all. It is conceded that it was not a criminal contempt, because not one of those enumerated in the statute. It certainly was not a private or civil contempt, for it invaded no right of an individual suitor before the court, and involved no question or duty of indemnity to an individual litigant. On a criminal trial a verdict of acquittal was rendered which shocked the sense of justice and aroused the indignation of the learned trial judge. It then appeared that Munsell, one of the jurymen, had gone to the scene of the affray for the purpose of acquainting himself with the locality. It is not alleged that he obtained any information. For that act he was committed for a contempt. On the face of the order it is recited that he willfully disobeyed the command of the court. If that was true there was a criminal contempt; but it is here conceded not to be true, and that no order of the court was disobeyed. Certainly, this was not a private or civil contempt. It is said the people were a party and their rights were invaded, and so were to be protected. But the people were the public, and their rights were the rights of public justice, and the offense, if one at all, was a public offense. The phrase "to protect the rights of any *such* party" means a party entitled to "civil remedies" in his action, and wielding the power of the court for his private and personal benefit. It is true that in every criminal action the people as parties plaintiff have rights to be cared for in its progress. But these rights are generally of a public character and respect the protection of

society. As in private contempts there are traces of a vindication of public authority, so in public contempts there are indications of private rights, but, as in the other instance, lost and overwhelmed in the predominating characteristics of the class. Upon a criminal trial there is often behind the people an individual complainant who has suffered in his rights of person or of property, and more or less interested in the prosecution; but he is not permitted to be a party; he must go elsewhere to redress his wrong; and it is not his right which is being enforced, but that of public justice with a view to the public safety. And the logical result of this must be that on a criminal trial, a disrespect to, or defiance of the court, which does not injure the private right of the accused, and calls for no vindication on his behalf, is either a criminal contempt, or a misdemeanor, or both, but cannot be a private or civil contempt.

The distinction between the two classes of contempts was observed very soon after the statutes were passed.

In a civil action decided in 1831, which the appellant cites, a party broke open books sealed up in the master's office, which was a contempt at common law. The chancellor said: "Upon my first examination of the Revised Statutes I was inclined to think that the section which defines criminal contempts had deprived the court of the power of punishing the improper conduct;" and then he holds that it was a civil or private contempt within subdivisions 2 and 8 because it was a case in which the rights of the adverse party were materially involved.

We need not determine whether this juror was guilty of any offense whatever, since if we should assume that he was, for the sake of the argument, and that what he did was unlawful and prohibited, his act would have been a criminal contempt but for the statute bar. It would have invaded no private right; no right of a mere suitor seeking a personal remedy for a wrong done him; but would have struck at public justice and the vigor and honesty of its administration; have been a disrespect to the court and a defiance of the public law, causing to miscarry a public prosecution. It is very certain that the learned trial court

Statement of case.

so understood and so dealt with it. The punishment adjudged was precisely the maximum of that fixed for criminal contempts both as to the fine and the imprisonment. There was no trace of indemnity to the people as plaintiffs. Their costs and expenses were not ascertained or considered, or sought to be reimbursed. Nothing was meant but punishment for a public offense to be dealt with as such. The court said the extreme punishment permissible was inadequate, but should be imposed. But thirty days in jail and \$250 fine was not the limit if this was a civil or private contempt. In that case both might have been greater. And in imposing the penalty upon the juror the court described it as "punishment for his misconduct." If there was misconduct the act would have been a criminal contempt but for the prohibition lodged in the words "no others." Those words are meaningless on the theory of the prosecution. For if the people are to be deemed like private suitors, and whenever their rights are infringed there may be a *quasi* civil contempt, and that punished as was this juror, precisely as if guilty of a criminal contempt, the whole statute and its prohibition is a complete absurdity. The roads are open on both its flanks.

We cannot so construe it. We think the General Term were right in saying that the juror could not be punished for a contempt.

The order of the General Term should be affirmed.

All concur.

Order affirmed.

ELIZABETH WELSH, Appellant, v. JOHN T. WILSON,
Respondent.

One doing business on a street in a populous city has the right to temporarily obstruct the sidewalk in front of his place of business, for the purpose of loading merchandise; the right, however, is to be exercised in a reasonable manner so as not unnecessarily to incumber the sidewalk; when thus reasonably exercising such right, the occupant of the

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Statement of case.

premises is not required to furnish to those passing upon the sidewalk a safe passage around the obstruction.

Defendant, for the purpose of removing certain cases of merchandise from his store in the city of New York, placed a pair of skids from a truck across the sidewalk to the steps of the store; after they had been there about three minutes plaintiff came along the sidewalk and seeing the skids attempted to pass around them by the steps, and in so doing slipped upon the steps and was injured. In an action to recover damages, *held*, that defendant owed no duty to the plaintiff to see that the steps were in an absolutely safe condition for travel; and that she was not entitled to recover.

(Argued December 16, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entering upon an order made May 8, 1882, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial.

This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

William G. Cooke for appellant. Defendant owed plaintiff a duty to see that the door-step was safe. She did not go there as his licensee, or by any privilege which was subject to his control or liable to revocation by him, but in the exercise of that right which every traveler has, to turn aside and go *extra viam* to avoid an obstruction in the highway. (*Taylor v. Whitehead*, Doug. 749; Comyn's Dig., tit. Chim. D. 6; *Dovaston v. Payne*, 3 Sm. L. C. [6th Am. ed.] 217; *Holmes v. Seeley*, 19 Wend. 510; *Williams v. Safford*, 7 Barb. 311; *Newkirk v. Sabler*, 9 id. 655; *Shea v. Sixth Ave. R. R. Co.*, 62 N. Y. 180; *Nicholson v. Erie Ry. Co.*, 41 id. 525; *Nolan v. King*, 97 id. 565, 572.) The question whether or not the skids were a nuisance ought to have been submitted to the jury. (*Manger v. Harrison*, 14 Weekly Dig. 201.) Plaintiff used all and more than the degree of precaution required. (*Nolan v. King*, 97 N. Y. 565.)

Opinion of the Court, per EARL, J.

John Sedgwick Bangs for respondent. The plaintiff did not unlawfully obstruct the street. (*People v. Cunningham*, 1 Denio, 530.) An obstruction of the highway is lawful when it becomes reasonably necessary for the transaction of business. (*Commonwealth v. Passmore*, 1 Serg. & Rawle, 219; *People v. Cunningham*, 1 Denio, 530.) If the obstructions are temporary and reasonable they will not be declared illegal merely because the public may not for the time have the full use of the highway. (*People v. Horton*, 64 N. Y. 610, 616; *Callan v. Gilman*, N. Y. Supr. Ct., Aug. 1, 1883; 24 Daily Reg., No. 27; 49 Sup. Ct. Repr. 542.) None of the damages claimed by the plaintiff were directly attributable to the skids or to the act of the defendant in permitting skids to be in front of his premises, and under such circumstances the only damages to which plaintiff could in any event have been entitled were nominal damages for the delay caused by the temporary obstruction. (*Ins. Co. v. Tweed*, 7 Wall. 52; 1 Suth. on Dam. 31-38; *Toker v. Damon*, 17 Pick. 284.) It was the duty of the plaintiff to use all reasonable exertion to render the injury as light as possible. (*Hamilton v. McPherson*, 28 N. Y. 72-76; *People v. Albany*, 5 Lans. 524-529.) Whatever injury befell plaintiff was the direct consequence of her own deliberate course of conduct. She cannot recover in such a case. (*Wilson v. Susquehanna Turnpike Co.*, 21 Barb. 68, 79; *Butterfield v. Forrester*, 11 East, 60; *Lowery v. Manhattan R. Co.*, 1 East. Rep'r, 608.)

EARL, J. The defendant, desiring to remove two large cases of merchandise from his store in the city of New York, placed a pair of skids from a truck across the sidewalk to the steps of the store. It would have taken not more than five minutes to remove the cases from the store to the truck. After the skids had been there about two minutes, the plaintiff came along the sidewalk, and seeing the skids in her pathway turned toward the store and attempted to pass around the skids, and in doing so she slipped upon the steps and was injured; and then she brought this action to recover damages.

Statement of case.

The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the cases of merchandise. Every one doing business along a street, in a populous city, must have such a right, to be exercised in a reasonable manner, so as not to unnecessarily incumber and obstruct the sidewalk. When the plaintiff found this obstruction in her pathway, she had the option, either to wait a couple of minutes, or to cross the street and pass upon the other sidewalk, or to pass around the truck in the street, or to take the way she selected. The defendant was under no obligation to furnish her a safe passage-way around the obstruction. (*People v. Cunningham*, 1 Denio, 524, 530; *Commonwealth v. Passmore*, 1 Serg. & Rawle, 219; *People v. Horton*, 64 N. Y. 610.)

The defendant owed the plaintiff no duty to see that its steps were in an absolutely safe condition for travel, and it does not appear that they were dangerous under such circumstances as to charge him with carelessness, even if that would have been sufficient to impose any liability upon him in this case.

We think the judgment should be affirmed.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

101	257
152	309

EDMUND R. HARRINGTON, Appellant, v. THE ERIE COUNTY SAVINGS BANK, Respondent.

It seems the rule that a trustee may not purchase or deal in the trust property in his own behalf does not render such a purchase void *ab origine*, but voidable only, and at the instance of the *cestui que trust* or of a party who has acquired the rights which belong to one in that relation. The title, even while in the hands of the trustee, may be confirmed as well by acquiescence and lapse of time as by the express act of the *cestui que trust*.

The title of a subsequent *bona fide* purchaser for value and without notice, when there is nothing on the record to show that his grantors had not a

Statement of case.

perfect right to convey, cannot be impeached, even in equity; he takes the land freed from the trust.

(Argued December 10, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made January 29, 1883, which denied a motion for a new trial and directed judgment for defendant on an order dismissing the complaint on trial.

This was an action of ejectment.

The material facts are stated in the opinion.

George Clinton for appellant. Upon the evidence the jury might legally have concluded, either that the conveyances by which the trustee got title were made for the purpose of swindling the estate, or that the object of such conveyances was to pay the claim made against the estate by him and give him in satisfaction the property in question. In either event the conveyances would be void, and the title would have remained in the trustees (*Lytle v. Beveridge*, 58 N. Y. 592; *Russell v. Russell*, 36 id. 581; R. S., part 2, chap. 1, title 2, art. 2, § 65 [7th ed.], p. 2183; *Briggs v. Davis*, 20 N. Y. 15; *S. C.*, 21 id. 57; *Douglas v. Cruger*, 80 id. 15; Bish. on Insol. Debt. [ed. of 1879] 311, 312; *Powers v. Bergen*, 6 N. Y. 358; *Fitzgerald v. Tapping*, 48 id. 438; *People v. Building Co.*, 23 Hun, 274; 92 N. Y. 98; *Marvin v. Smith*, 46 id. 571.) The quit-claim deed, being in contravention of both the trust expressed in the deed and the power in trust in the will, is void. The plaintiff would not be estopped by such a deed if it had been proven, either as against the trustees or Mrs. Harrington. (*Stuart v. Kissam*, 2 Barb. 493; *Heath v. Crealock*, L. R., 10 Ch. App. 22; *S. C.*, 11 Eng. Law Rep. [Moak] 436; *Douglas v. Cruger*, 80 N. Y. 15; Bigelow on Estop. 480.) The transfer of defendant was in contravention of the trust, which is expressed in the assignment, and, therefore, absolutely void under the statute as the trust was still alive. (R. S., part 2, chap. 1, title 2, art. 2, § 65; *Thatcher*

Statement of case.

v. *Candee*, 3 Keyes, 157; *Briggs v. Palmer*, 20 Barb. 392; affirmed, *sub nom. Briggs v. Davis*, 20 N. Y. 15; 21 id. 574; *Acer v. Westcott*, 46 id. 384, 392; 7 Lans. 193; *Lyle v. Beveridge*, 58 N. Y. 592; *Bergen v. Bennett*, 1 Caine's Cas. in Error, 348; *Davos v. Fanning*, 2 Johns. Ch. 204; *Gardner v. Ogden*, 22 id. 344; *Callahan v. Cunningham*, 8 Cow. 361; *Perry on Trusts*, § 205.) A purchaser having knowledge of facts sufficient to put him on inquiry is presumed to have made inquiry, and is chargeable with notice of whatever he could have ascertained by the inquiry upon which the circumstances should have put him. (*Reed v. Gannon*, 50 N. Y. 345, *Cordova v. Hood*, 17 Wall. 1; *Att'y Gen'l v. Biphosphated Guano Co.*, 27 Weekly Rep. 621; *Gallatin v. Cunningham*, 8 Cow. 361; *Balcom v. Life Ins. Co.*, 11 Paige, 454; *Boone v. Childs*, 10 Pet. 177, 212; 2 Wait's Act. and Def. 507; *Jackson v. Matsdorf*, 11 Johns. 91; *Jackson v. Mather*, 7 Cow. 301.)

E. C. Sprague for respondent. The sale to George P. Stevenson assuming that it was *bona fide*, and that the estate was credited with the amount of the proceeds, was in legal effect a compliance with the provisions of the trust deed. (*Briggs v. Davis*, 20 N. Y. 30, 31; *Dodge v. Stevens*, 94 id. 209, 214.) The credit given to the trust account by Edward I. Stevens for \$10,000 is equivalent to the payment by George of that amount of money to the trustees, and is a conversion of the land into money within the meaning of the assignment. (*Silverthorn v. McKinstorn*, 12 Penn. St. 67; *Whittington v. Roberts*, 4 Monr. [Ky.] 173, 174; *Livingston v. Newkirk*, 3 Johns. Ch. 312, 318, *Ball v. Miller*, 17 How. Pr. 300; *Duntz v. Duntz*, 44 Barb. 461, 462; *Slade v. Vanvechten*, 11 Paige, 21, 22, 25; *Graham v. Dickenson*, 3 Barb. Ch. 170; *Wallace v. Duffield*, 2 Serg. & R. 524; *Rogers v. Tilley*, 20 Barb. 639; *Bergen v. Bennett*, 1 Caine's Cas. 18.) Whether the sale was for the full value of the land is immaterial. (*Briggs v. Davis*, 20 N. Y. 30-32; *Shelton v. Homer*, 5 Metc. 467; *Dubois v. Barker*, 4 Hun, 80; *Peck v. Newton*, 46 Barb. 173;

Statement of case.

Gallatin v. Cunningham, 8 Cow. 361, 377-384.) A sale can only be deemed in contravention of the trust where it is in conflict with its terms. Where a trust deed, as in this case, directs a sale without limit as to time, price, purchase or terms, and where no conditions precedent to the exercise of the power to sell remain unfilled, the sale is valid. (*Lytle v. Beveridge*, 58 N. Y. 592; *Russell v. Russell*, 36 id. 581; *Briggs v. Davis*, 21 id. 574; *Allen v. Dewitt*, 3 Comst. 276; *Rome v. Phillips*, 27 N. Y. 357; *Douglas v. Cruger*, 80 id. 15; *Powers v. Bergen*, 6 id. 358; *Perry on Trusts*, 785; *Roseboom v. Mosher*, 2 Den. 61; *Dubois v. Barker*, 4 Hun, 80; *Hancox v. Meeker*, 28 id. 214; *Belmont v. O'Brien*, 2 Kern. 394; *Jackson v. Vandalsen*, 5 Johns. 43; *Jackson v. Walsh*, 14 id. 407; *Jackson v. Brooks*, 8 Wend. 426; *Silverthorn v. McKinster*, 12 Penn. St. 67; 3 Ross' Com. Law, 305, 319; *Burr. on Assign.* 392; 1 *Perry on Trusts*, 205; *Taintor v. Henderson*, 7 Burr. [Penn.] 48; *Bradstreet v. Clark*, 12 Wend. 602, 667; *Dundas v. Hiscock*, 12 How. [U. S.] 256, 271; *Sugden on Pow.* 82; 2 R. S. [6th ed.] 1109, § 73; 1119, § 164; 1130, 1; 2 R. S. 1110, § 79; *Peck v. Newton*, 46 Barb. 173; *Gallatin v. Cunningham*, 8 Cow. 361; *Johnson v. Bennett*, 39 Barb. 237; *Hubbell v. Sibley*, 50 N. Y. 71, 472, 473; *Tiff. & Bull. on Trustees*, 811; *Dodge v. Stevens*, 94 N. Y. 209; *Chapman v. Delaware, etc., R. R. Co.*, 3 Lans. 284; 1 *Perry on Trusts*, 205.) All the deeds should be construed as one instrument and constitute a substantial compliance with the provisions of the will. (*Cooper v. Whitney*, 3 Hill, 95.) The provisions of the trust deed, and the will of Mr. Harrington construed together and in connection with the quit-claim deed of the children, the deed to Mrs. Harrington, the bond and mortgage of indemnity given by her, and the entire object of all these transactions conclusively show that the sale was a legal performance of the intention of Harrington as shown by his assignment and his will, and within the powers of the children and trustees and the executors' clause of the will as to payment by executrix of the debts provided for by the assignment. (*Lang v. Ropke*, 5 Sandf. 363; *Burr. on Assign.* [2d ed.] 394; *Merrill v. Englesby*, 28 Vt. 150.) None of the con-

Statement of case.

veyances in question are void under the provisions of the statutes as to fraudulent conveyances. (3 R. S. [6th ed.] 224, 225, § 5.) The quit-claim deed from plaintiff and the other heirs of Harrington to Spaulding and Stevenson conveyed to them in their own right all the interests, legal or equitable, which he then had in the premises, and he has acquired no right since. (1 R. S. 748 [6th ed.] vol. 2, 1130, § 1; 2 R. S. [6th ed.] 1094, § 17; 3 R. S. [6th ed.] 225, § 2; 2 R. S. 1105, § 49; 1103, § 35; 1101, §§ 8, 9, 10, 11; 1104, § 4, 2; 1110, § 76; 4 Kent, 211, note; *Tower v. Hale*, 46 Barb. 361; *Peck v. Mallams*, 10 N. Y. 509, 537, 538; 4 Kent, 262, note; *Jackson v. Walsh*, 14 Johns. 407, 414, 415, 66; *Jackson v. Brooks*, 8 Wend. 426; *Nicholson v. Halsey*, 1 Johns. Ch. 417; *James v. Morey*, 2 Cow. 246.) The rule that the title can only be questioned in such a case by proceedings in equity is inflexible. (*James v. Morey*, 2 Cow. 246; *Jackson v. Walsh*, 14 Johns. 407, 414, 415; *Shelton v. Homer*, 5 Metc. 467; *Bostwick v. Atkins*, 3 Comst. 53, 60.) The plaintiffs are estopped by their deed from asserting a legal title to the premises in dispute, whatever may be their equitable rights to call assignees to account. (4 Kent, 98.) The defendant is entitled to protection as a *bona fide* purchaser of the premises. (*Clafin v. Lenheim*, 66 N. Y. 801; *Birdsall v. Russell*, 29 id. 220, 249; *Welch v. Sage*, 47 id. 143, 147; 2 Kent, 147; 2 R. S. 1104, § 41; *Lang v. Ropke*, 5 Sandf. 363; *Morrison v. Brand*, 5 Daly, 40; *Roger v. Murray*, 3 Paige, 390; *Guthrie v. Gardner*, 19 Wend. 414; 1 Story's Eq. Jur., § 64, chap. 381, 410, 411; *Briggs v. Davis*, 20 N. Y. 23, citing *Jones v. Powles*, 3 M. & K. 581; *Tiffany & Bullard on Trustees*, 197, 198, 199, 818; *Jackson v. Walsh*, 14 Johns. 407, 415; *Jackson v. Henry*, 10 id. 185, 195; *Frazer v. Western*, 1 Barb. Ch. 220, 240; *Mowry v. Walsh*, 8 Cow. 238; *Warner v. Blakeman*, 36 Barb. 501, 519.) Conceding that there has been no conveyance of the premises in question by the trustees, the plaintiff cannot maintain ejectment for the reason that the legal title still remains with the trustees. (1 R. S. [1st ed.] 730, § 67; 2 R. S. [6th ed.], 1110, § 60; *Calkins v. Calkins*, 3 Barb. 305; *Sayre v. Wisner*, 8 Wend. 661;

Amsberry v. Hinds, 48 N. Y. 57; *Satter v. Tobias*, 3 Paige, 338; Ang. on Lim., § 22; *Rogers v. Murray*, 3 Paige, 390; *Williams v. City of Oswego*, 25 Hun, 36, 38; *Rogers v. Leftwitch*, 2 Heisk. [Tenn.] 480; Laws of 1875, chap. 545; *Wood v. Mather*, 38 Barb. 473; *Wood v. Mather*, 44 N. Y. 249; *People v. Canal*, 6 id. 463; *R. R. Co. v. Van Horn*, 57 id. 473.) The plaintiff, irrespective of his quit-claim deed, is estopped by the facts proved from asserting any claim to this property by silence while Stevenson and the defendant were erecting buildings. (*Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Bowen v. Bowen*, 30 N. Y. 519; *Niven v. Belknap*, 2 Johns. 573, 589; *Higenbotham v. Barnet*, 5 Johns. Ch. 184, 188; *Cheaney v. Arnold*, 18 Barb. 434, 440; *Brewster v. Baker*, 16 Barb. 613, 618; *Walrath v. Redfield*, 18 N. Y. 457) Plaintiff is estopped by the receipt by the estate of the purchase-money of which the plaintiff has had the benefit, which there has been no offer to repay, and which cannot be offset or ordered to be repaid by any judgment which can be rendered in this action. (Big. on Estop. 514; *Tompkins v. Hyatt*, 23 N. Y. 347; *More v. Smedburgh*, 8 Paige, 600.) He is also estopped by lapse of time in equity and by the equitable defenses set up in the answer, and which were established by the plaintiff's own evidence. (Code of Civ. Pro. 1531; 2 R. S. [6th ed.] 578, § 45; *Bedell v. Shaw*, 59 N. Y. 46; *Barney v. Griffith*, 5 Sandf. Ch. 552, 558; *Colburn v. Morton*, 5 Abb. Pr. [N. S.] 308, 316; *Peabody v. Flint*, 6 Allen, 52, 57; Story's Eq. Jur., §§ 1520, 1523; id. 81; *Bostwick v. Atkins*, 3 Comst. 53, 60; Tiff. & Bull. on Trustees, 146, 148; *Bergen v. Bennett*, 1 Caines, 19 *et seq.*; *Cunningham v. Cassidy*, 17 N. Y. 276; *Hubbell v. Medbury*, 51 id. 100; *Fifth N. Bk. v. Hyde Park*, 101 Ill. 595; Pom. on Rem. 379; *Duncomb v. R. R. Co.*, 84 N. Y. 190, 199; *Getty v. Devlin*, 54 id. 403, 415; *Gould v. N. Bk.*, 86 id. 75, 82, *et seq.*; *Boerum v. Schenck*, 41 id. 182, 196, 197.)

DANFORTH, J. The record shows that this action was commenced on the 19th of April, 1877, to recover possession of

certain premises lying on the corner of Main and Court streets, in the city of Buffalo, then in possession of the defendant, but to which the plaintiff claimed to have title. The defendant admitted possession of the premises, and denying any title or interest in the plaintiff, among other defenses asserted a legal title in itself, acquired in April, 1865, by purchase, in good faith and for a valuable consideration, from one Edward L. Stevenson, without notice of any claim on the part of the plaintiff; facts sustaining this allegation were in evidence before the plaintiff rested, and of themselves justified the nonsuit against which this appeal is taken.

It appeared that Isaac R. Harrington was the common source of title; that he died in August, 1851, leaving a will under which the plaintiff took if at all, as one of several residuary devisees. But before that, as the plaintiff also showed, his testator in November, 1847, conveyed this, with other property, to Edward L. Stevenson and Elbridge G. Spaulding "in trust to sell and dispose of the same upon such terms and conditions as in their judgment might appear best and most for the interest of the parties concerned, and convert the same into money, and by and with the proceeds of said sales and collections, to "pay the expenses of the trust and care of the property, and apply the balance upon debts" named or referred to as set out therein. His wife, Amanda, joined in the assignment, and she was also the sole executrix of his will. In December, 1852, the assignors and Mrs. Harrington, for an expressed consideration of \$10,000, conveyed the property to George P. Stevenson, and he on the 25th day of February, 1856, conveyed it to Edward L. Stevenson, who on the 10th of April, 1865, for an actual consideration of \$20,000 then paid to him, executed a deed with warranty and covenants of seizin to the defendant. In each instance possession of the premises corresponded to the legal title. The assignment and several conveyances above referred to were all duly recorded before the execution of the deed to the defendant. It vests a plain record title, and we agree with the learned trial judge and the General Term in the opinion that nothing was proven to impeach it.

Suppose we concede on behalf of the appellant that the jury

might have found that the conveyance by the trustees to George Stevenson was a device to get the title into Edward, who was one of the trustees, to satisfy a claim of the latter against the estate of Isaac, the creator of the trust, and provided for in his assignment. The existence and *bona fides* of the claim cannot upon the evidence admit of doubt, and it was proved that by the transaction, the claim was to that extent satisfied. We are, therefore, unable to see how the act can be characterized except as one done for the benefit of the estate, apparently within the terms of the power in trust, and not in conflict with them. The appellant relies upon the well-established doctrine that a trustee cannot purchase or deal in the trust property in his own behalf, or for his own benefit, directly or indirectly. This is a rule of equity and is not to be impaired or weakened. Such a purchase, however, is not void *ab origine*, but voidable only, and at the instance of the *cestui que trust*, or of a party who has acquired the rights which belong to one in that relation. Even while in the hands of the trustee the title may be confirmed as well by acquiescence and lapse of time as by the express act of the *cestui que trust*. These elements exist, but need not be considered, for a legal estate acquired by a subsequent *bona fide* purchaser in good faith and without notice cannot be impeached even in equity. He takes the land freed from the trust.

That seems to be the situation of this defendant. There was nothing on record to show that its grantor had not a perfect right to convey, and if he had not, it was owing to some undisclosed act or circumstance of which there is no reasonable ground for suspicion the defendant had notice.

We have examined the various propositions of the learned counsel for the appellant, but find none which shows error committed by the trial court in dismissing the complaint, or which, in view of the opinion above expressed by us, requires further notice.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

Statement of case.

ROBERT A. STANTON, as Receiver, Etc., Appellant, v. WILLIAM G. WESTOVER et al., Respondents.

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One of two partners on retiring from the business transferred to his co-partner his interest in the firm property, each agreeing to pay one-half of its debts. The firm was solvent, but the remaining partner was in fact insolvent at the time. This, however, was not known to him or the retiring partner, and the transfer was made in good faith. In an action wherein creditors of the firm claimed a preference over the individual creditors of the remaining partner, *held*, that by the transfer the title vested in the remaining partner as his own private estate; that he acquired the same dominion over it as if it had always been his own separate property free from any lien or equity on the part of partnership creditors, and that transfers by him of the property in payment of individual debts were lawful.

(Argued December 17, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made July 2, 1883, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff as receiver of the joint property of defendants Osmer M. and William G. Westover, who formerly composed the firm of O. M. & W. G. Westover, and of the separate property of Osmer M. Westover, to set aside as fraudulent a sale of his interest in the partnership property, made by William G. to Osmer M. Westover on the retirement of the former from the business; also to set aside two chattel mortgages covering the property thereafter executed by Osmer M., to secure individual debts, and a general assignment made by him for the benefit of creditors.

Plaintiff was appointed receiver in supplementary proceedings in an action against the two members of the firm upon a firm debt. The facts, so far as material, are stated in the opinion.

Statement of case.

John W. Church for appellant. As between a firm and its creditors the property is vested in the firm, and no individual partner has an exclusive right to any part of the joint stock until the firm debts are paid and a balance of account is struck between him and his copartners and the amount of his interest accurately ascertained. (*Menagh v. Whitwell*, 52 N. Y. 146, 158, 159, 161, 162, 165, 166, 167.) The equity of partnership creditors to have the partnership assets applied first to the payment of their debts is that of the partners alone, and is to be worked out through them, and they can terminate it at will. (*Sage v. Chollar*, 21 Barb. 596; *Ketchum v. Durkee*, 1 Barb. Ch. 480; *Smith v. Howard*, 20 How. Pr. 121; *Dimon v. Hazard*, 32 N. Y. 65, 80.) The firm assets transferred to O. M. Westover by W. G. Westover and those transferred by the latter to the former were charged with a trust for the payment of the firm debts, and under the circumstances their respective assignees hold them charged with the same trust. (*Moss v. Gleason*, 64 N. Y. 204; *Menagh v. Whitwell*, 52 id. 146. *Goertner v. Trustees, etc.*, 2 Barb. 628; *Burtus v. Tidball*, 4 id. 571; *Wilds v. Chapman*, 4 Edw. Ch. 669; Pars. on Part. 253.) The voluntary assignee was apprised of Woodman's rights before he entered upon his duties, and no equities appear in his favor. His *bona fides* do not aid his title. (*Young v. Hermans*, 66 N. Y. 374; *Griffin v. Marquardt*, 17 id. 30.) The assignment from O. M. Westover to Jane was void under the statute. (2 R. S. 137, § 1; *Van Nest v. Zoe*, 1 Sandf. Ch. 4; *Rockenbaugh v. Hubbell*, 5 L. R. [N. S.] 95; Wait's F. C., § 325; *Planck v. Schemerhorn*, 3 Barb. Ch. 644; *Read v. Worthington* 9 Bosw. 628; *Burdick v. Post*, 72 Barb. 172; *Nicholson v. Leavitt*, 6 N. Y. 517; *Oliver Lee & Co.'s Bank v. Talcott*, 19 id. 149; *Hyslop v. Clark*, 14 Johns. 458; *Grover v. Wakeman*, 11 Wend. 187; *Wakeman v. Grover*, 4 Paige, 23; Bump, 19, 27, 263.) The fact that at the time of the transfer both parties to it were insolvent renders it illegal and void as against plaintiff, to the extent of the indebtedness of the firm to him, or the judgment creditor he represents, notwithstanding it was made

Opinion of the Court, per FINCH, J.

in good faith. (*Hard v. Mulligan*, 8 Abb. N. C. 63; *Fisk v. Gould*, 12 Fed. Rep. 372; *Wilson v. Robertson*, 21 N. Y. 587, 592; *Willard's Eq.* 708; *Dimon v. Hazard*, 32 N. Y. 65; *Ransom v. Vandeventer*, 41 Barb. 316; *Jackson v. Cornell*, 1 Sandf. Ch. 348; *Deveau v. Fowler*, 2 Paige, 400; *Menagh v. Whitwell*, 52 N. Y. 146; *Hulbert v. Dean*, 2 Keyes, 97; *Kameth v. Bassett*, 34 Barb. 31; *Heye v. Bolles*, 33 How. 277; *Fassett v. Tallmadge*, 18 Abb. 53; *O'Niel v. Salmon*, 23 How. 248; *Forgerty v. Cullen*, 49 Supr. Ct. 397; *Fitzpatrick v. Flanagan*, 27 Alb. L. J. 175.)

James W. Glover for respondents. An assignment is to be upheld unless clearly proved fraudulent. (*Bingham v. Tillinghast*, 15 Barb. 620; *Shutz v. Hoagland*, 85 N. Y. 464; *Rapalee v. Stewart*, 27 id. 318; *Griffin v. Marquardt*, 21 id. 121.) Good faith is always presumed. Fraud must be shown affirmatively. (*Townsend v. Stearns*, 32 N. Y. 213, 215; *Bank of Silver Creek v. Talcott*, 22 Barb. 561.) When one of two partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner acquires the same domain as if it had ever been his own separate property. (*Dimon v. Hazard*, 32 N. Y. 65; *Iveschick v. Addison*, 3 Rob. 344; *Menagh v. Whitwell*, 52 N. Y. 160, 167, 171; *Fitzpatrick v. Flanagan*, 27 Alb. L. J. 175; *Sage v. Cholar*, 21 Barb. 598; *Field v. Hunt*, 21 How. 463; *Ketchum v. Durkee*, 1 Barb. Ch. 480; *Krib v. Schoonmaker*, 3 id. 46; *Corey v. Long*, 2 Sweeney, 495; *Smith v. Howard*, 20 How. 121; *Greenwood v. Broadhead*, 8 Barb. 596, 597.)

FINCH, J. The judgment in this action is fully sustained by the case of *Dimon v. Hazard* (32 N. Y. 65). It was there held that where one of two partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner acquires the same dominion as if it had ever been his own separate property; that the transfer being made in good faith, the title vests in the remain-

Opinion of the Court, per FINCH, J.

ing partner as his own private estate, free from any lien or equity in favor of partnership creditors; and that such remaining partner may lawfully transfer such property in payment of his individual debts. In this case, the good faith of the transfer is abundantly proved, and found as a fact by the trial court. The partnership was perfectly solvent; its debts being only about \$1,500, and its assets \$9,000. The retiring partner received \$3,800 in outside securities, except to the extent of \$900, which was paid to him in firm notes and accounts, and agreed to pay one-half of the firm debts, the remaining partner agreeing to pay the other half. For a period of five months the situation remained unchanged, and the property open to levy; and during that time the retiring partner offered to pay one-half of the debt here in question upon being fully released. The creditor had a right to decline the offer, but the fact that it was made bore strongly upon the question of good faith. By force of this arrangement neither party retained any equity against the other. By their joint consent the goods became the individual property of the remaining partner, and the \$900 in notes and accounts the individual property of the retiring partner, and no partnership property remained. Each by the agreement of transfer substituted for the partner's equity the personal contract of the other to pay, and had left only the right to enforce that contract against the individual contracting. The property of O. M. Westover thus lost its character of partnership property, and became the separate property of the individual. This result is claimed to have been changed by the doctrine of this court in *Menagh v. Whitwell* (52 N. Y. 146). We do not so understand it. It was there distinctly said that "there is another class of cases in which the partnership effects have been held to be liberated from liability to be applied to partnership debts, in preference to the separate debts of one partner; that is where a *bona fide* sale has been made by a retiring partner in a solvent firm of two members to his copartner, the latter assuming the debts. In such a case it is settled that the property formerly of the partnership becomes the separate property of the purchasing partner,

and that the partnership creditors are not entitled to any preference as against his individual creditors in case of his subsequent insolvency. But in those cases the joint property was converted into separate property by the joint act of all the members of the firm. They had power to dispose of the *corpus* of the joint property, and the exercise of that power, when free from fraud, divested the title of the firm as effectually as if they had united in a sale to a stranger." The question in the case, from which we have made the foregoing citation, was further said to be the effect upon the title of the firm, as between it and its creditors, of several transfers by the partners to third persons. Two circumstances only mark a difference in the case before us from those supposed in the doctrine thus established. Here the debts were not all assumed by the purchasing partner, and the latter was in fact insolvent as an individual at the date of the transfer. But, as we have already seen, each assumed one-half of the debts in severalty as between themselves, and in reliance upon the individual responsibility of each other; neither retaining any partnership equity since no partnership property remained. The insolvency of the purchasing partner, if known to him and to the seller, might very well be strong evidence of an intent to defraud the partnership creditors, and become conclusive upon that question if there was no explanation. But here the purchasing partner supposed himself to be solvent, and was so believed to be by the seller. The former continued in business for five months before his failure, during which period he stood open to a levy by the firm creditors, and the offer of the retiring partner to pay the half he had assumed tended to rebut any fraudulent intent.

On this state of facts it is found that there was no fraud, and we think correctly. The contrary could not be held as matter of law.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

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JOHN REED, Respondent, v. GEORGE McCONNELL, Survivor,
etc., Appellant.

In an action to recover damages for breach of a contract to form and continue a partnership for a specified term, the opinion of the witnesses as to the value of the contract to plaintiff, or as to what would have been his share of the profits had the contract been carried out, is incompetent and its reception error.

(Argued December 17, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 11, 1883, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

M. D. Grover for appellant. The measure of damages in every case of breach of contract is the value of the contract. The party should be made good, but speculative and contingent profits cannot be recovered or proved by opinion. (*Van Ness v. Fisher*, 5 Lans. 236; *Griffin v. Colver*, 16 N. Y. 439; *Rogers v. Beard*, 36 Barb. 31; *Wagoner v. Corkhill*, 40 id. 175; *Pollett v. Long*, 53 id. 35; *Cassidy v. Lefevre*, 45 N. Y. 562; *Washburn v. Hubbard*, 6 Lans. 11; *Howe Machine Co. v. Bryson*, 44 Iowa, 24; *McWhiter v. Douglass*, Cald. [Tenn.] 591; 25 Ill. 86; *Bierbach v. Goodyear R. Co.*, 54 Wis. 208; 41 Am. Rep. 19; *Masterton v. Mt. Vernon*, 53 N. Y. 391; *Lincoln v. Sar. R. R. Co.*, 23 Wend. 425; *McIntyre v. N. Y. C. R. Co.*, 37 N. Y. 287; *Grant v. City of B'klyn*, 41 Barb. 381; *Nebraska City v. Campbell*, 2 Black, 590; *Walker v. Erie R. Co.*, 63 Barb. 260; *Giles v. Tole*, 4 id. 261.) Damages may include gains and profits prevented as well as losses sustained, provided they are certain and such as might naturally follow the breach; but the law excludes uncertain and contingent profits. (*McWhuty v. Douglass*, 1 Col. ; *Schile v. Brokhhaus*, 80 N. Y. 614; *White v. Miller*, 71 id. 133; *Walcott v. Mount*, 36

Statement of case.

N. J. 13.) A person who is not interested in the business of a firm or in the capital invested, save that he is to receive a share of the profits as a compensation for his services, or for money loaned for the benefit of the business, is not a partner. (*Richardson v. Hughitt*, 76 N. Y. 55; *Moore v. Huntington*, 7 Hun, 426; *Smith v. Bodine*, 74 N. Y. 30; *Cary v. Fowler*, 87 id. 33; *Cox v. Heckman*, 84 Ill. L. C. 263; *Everson v. Power*, 89 N. Y. 527; *Wolfe v. Stutenbaker*, 65 Penn. St. 459.)

A. Pond for respondent. The contract between the parties, whatever its precise terms were, if satisfactorily established by the pleadings and evidence, must be deemed and regarded as a legal and valid contract, inasmuch as the defendant's counsel expressly stipulated at the trial that they would make no claim that it "is void if found to be as stated by the plaintiff in his testimony or as established by the evidence in this case." (*Bommer v. Ames, etc., Hinge Co.*, 81 N. Y. 468.) Such stipulation is an entire waiver of such an objection, if any such previously existed thereto, an express waiver is as good as an implied one, and both exists here. (*Marston v. Swett*, 66 N. Y. 206; *Porter v. Wormser*, 91 id. 431, 450; *Durham v. Cudlipp*, id. 129, 134.) The referee committed no error in law in finding in favor of the testimony of the plaintiff, one party, against that of the defendant, the other party, nor indeed in finding against the uncontradicted evidence of the defendant, an interested party, if he did so find. (*Gildersleeve v. Landon*, 73 N. Y. 609; *Kavanah v. Wilson*, 70 id. 177; *Elwood v. W. U. Tel. Co.*, 45 id. 549, 554; *Russell v. Freer*, 56 id. 67, 69.) Moreover if the defendants turned off the plaintiff without cause as found by the referee, and thereby prevented the latter from aiding and assisting the defendants in earning profits, and also discontinued the business so that no profits could thereby be made or earned, the defendants are now estopped from claiming that no profits could have been made in the business had it continued. (*Gifford v. Waters*, 67 N. Y. 80; *Hand v. Campbell*, 26 Mich. 239, 245; *Bayley v. Smith*, 6 Seld. 499; *Dennis v. Maxfield*, 10 Allen, 142; *Leediv v. Am-*

Statement of case.

hurst, 20 Beav. 239.) The plaintiff is entitled to recover as damages for the breach of the contract what its value to him was at the time of the breach, taking into consideration what the plaintiff has lost in services and money, and the gains in the shape of profits he would have received and which he has been prevented from receiving in consequence of such breach of the contract by the defendants. (*Danolds v. The State*, 89 N. Y. 36, 50; *Taylor v. Bradley*, 39 id. 129, 144; *Masterton v. Mayor, etc.*, 7 Hill, 61; *Bagley v. Smith*, 6 Seld. 489, 497, 498; *Schell v. Plumb*, 55 N. Y. 592, 595; Sedg. on Dam. [7th ed.] 119, 120; *Hay v. Grenoble*, 34 Penn. St. 9; *Wolfe v. Studebaker*, 65 id. 288; *Garsed v. Turner*, 71 id. 56; *Erie & Pitts. R. R. Co. v. Donthet*, 88 id. 243; *Dennis v. Maxfield*, 10 Cush. 138; *McNeal v. Reid*, 9 Bing. 68; *Rhodes v. Bond*, 16 Ohio St. 573; *Armor v. Oakley*, 131 Mass. 413; *Simpson v. Lon. & N. W. R. Co.*, 16 Eng. Rep. [Moak] 330; *Jaques v. Millar*, 22 id. 728.) The only possible way to prove the value of the contract between the parties at the time of its breach by the defendants, it having been broken before any business was done under it, was by the opinions of witnesses who had the peculiar knowledge and the requisite experience in the tannery business and upon the general subject to make them experts. (*Taylor v. Bradley*, 39 N. Y. 129, 114; *Mitchell v. Read*, 19 Hun, 419; 84 N. Y. 556, 559; *Eldridge v. Smith*, 13 Allen, 140; *Scattergood v. Wood*, 79 N. Y. 263; *Harpending v. Schoenmaker*, 37 Barb. 270, 289; *Whitbeck v. N. Y. C. R. R. Co.*, 36 id. 644; *Smith v. Gugerly*, 4 id. 615, 625; *Colwell v. Lawrence*, 38 N. Y. 71, 72; *Spencer v. Smith*, 46 Barb. 320, 322.) The fact that it was the wrongful and fraudulent act of the defendants, in refusing to perform the contract, that creates the necessity for proving its value, estops them from objecting to the only evidence by which alone it can be proved. (*Gifford v. Waters*, 67 N. Y. 81, 83; *Bagley v. Smith*, 6 Seld. 499; *Dennis v. Maxfield*, 10 Allen, 112; *Lord v. Campbell*, 26 Mich. 239, 245; *Leeds v. Amhurst*, 20 Beav. 239.)

Opinion of the Court, per EARL, J.

EARL, J. So far as we are now concerned with this action, it was brought to recover damages for the breach of an agreement on the part of the defendants to take the plaintiff into a partnership in a tannery. The material facts as found by the referee are as follows: In the month of March, 1877, the plaintiff solicited the defendants to enter into the project of building a tannery at Oregon, in the county of Warren, in this State. He at the time owned a contract for the purchase of a site for the proposed tannery, and also a refusal or option for the purchase of fifty thousand cords of hemlock bark on the tree in the vicinity of the site. In the month of May, 1877, negotiations were entered into between him and the defendants for the purchase of the tannery site and bark by the defendants and the building of the tannery, and about the middle of that month an agreement was entered into between him and them in regard to such purchase, the building of the tannery and the tanning of hides thereat as follows, viz.: The defendants were to furnish to the plaintiff the money to purchase the tannery site, to erect a tannery thereon, and to supply the same with the necessary machinery, conveniences, tools, etc., to properly run the same so as to tan sole leather; the plaintiff was to negotiate such purchase and superintend the building of the tannery, negotiate for the purchase of the bark (to be paid for by the defendants) and he was to receive from them for his services the sum of \$1,000 per year; on the completion of the tannery and the purchase of the bark, the defendants were to stock the tannery with hides for tanning, to sell the leather tanned therefrom, and the plaintiff was to have the superintending of the tannery and conduct the business of tanning sole leather thereat; the profits of such business were to be distributed as follows, viz.: After all expenses in carrying on and running the tannery, interest on all capital invested at the rate of seven per cent per annum, five per cent commission for buying the hides and six per cent commission for selling the leather tanned therefrom, had been taken out by the defendants, the balance of the profits, if any, was to be divided between the parties in the proportion of one-third to the plaintiff and two-thirds to the defendants; the

Opinion of the Court, per EARL, J.

plaintiff in superintending the building and running the tannery was to spend only one-half of his time for which he was to receive from the defendants the sum of \$1,000 per year, to be included in the running expenses of the tannery; and his board and the keeping of his horses while at the tannery were to be paid by the defendants as a portion of the expenses of building, and after the erection, of running the tannery; the business was by the terms and conditions of the agreement to continue for the period of twelve years. Pursuant to the agreement, the tannery site, bark and bark contracts were purchased, the tannery was erected and stocked with hides and the business of tanning sole leather thereat was commenced. The defendants furnished hides to stock the tannery, and the plaintiff conducted the business of tanning and had charge of the tannery and business thereat until on or about the 1st day of October, 1878, when the defendants, without cause or provocation, and in violation of their agreement, discharged and removed the plaintiff from the business and the superintendency of the tannery and from all connection with the business, and then and ever since have declined and refused to employ and continue the plaintiff in the business and to pay the plaintiff any profits arising from the business, and have claimed, and still do claim and insist, that he has no right or title in the tannery building, bark or business, and refuse to carry out their agreement with him. And the referee found that the value of the agreement to the plaintiff would have been, if carried out in accordance with its terms, the sum of \$12,000, and that he was, by reason of the breach of the agreement, damaged in that sum.

Upon the trial of the action the plaintiff was allowed to prove the value of his agreement and the amount of his damages by the opinions of witnesses. He, as a witness on his own behalf, was asked this question: "What, in your judgment, was the net value of your contract with the defendants, if carried out, to go into partnership with them, per annum, taking into consideration the rental value of the property, the expense of purchasing hides and sale of leather, and all the expenses connected

Opinion of the Court, per EARL, J.

with tanning?" To this the defendants objected, among others, upon the ground that the court was to determine the value from the facts found, and that such value could not be determined from the opinion of the witness. The referee overruled the objection, the defendants excepted to the ruling, and the witness answered: "At least \$3,000, per year, besides my stipulated compensation of \$1,000." Another witness was asked this question: "What, in your judgment, is the value of a contract for tanning sole leather at Oregon tannery as follows: You are to have one-third of the net profits of that tannery for twelve years from July or August, 1877, to be included, in addition to the ordinary expenses of the tannery, \$1,000 per year for foreman and general supervision, the interest on \$20,000 at seven per cent cost of the tannery, and commissions, for the purchase of leather and purchase of hides?" There were the same objections, ruling and exception as before, and the witness answered: "I think from \$3,000 to \$4,000 per year." Another witness was asked this question: "State whether or not, in your judgment, tanning could be made profitable at Oregon tannery, the tannery to have the capacity of four hundred tons a year, tanning by the non-acid process, tannery to cost \$20,000, the usual commissions to be paid, five per cent for buying hides and six per cent for selling leather, the contract to continue twelve years, commencing in January or February, 1878, with a contract for fifty thousand cords of bark at fifty cents a cord on the tree, on the Griffin lands, and roads built to land; if so, how profitable?" The defendants objected to this as incompetent and not the proper measure of damage. The referee overruled the objection, and the witness answered that the tannery could be made profitable and the profit would be at least \$9,000 per year. Subsequently the same question was put to another witness and objected to upon the same grounds, and the objection was overruled, and the witness answered that a profit of \$12,000 per year could be made for twelve or fifteen years.

We think these opinions were improperly received. They violated the general rule of evidence that witnesses must state

Opinion of the Court, per EARL, J.

facts and not give opinions, and they do not come within any of its exceptions. There is no certain or proper basis for such opinions, and that they are of little or no value as guides to a just result plainly appears. Several witnesses of the defendants testified that the tannery, under the conditions mentioned in the contract, could make no profits, and the referee, upon the request of the defendants, found that no profits had been made in the tannery when the plaintiff left it, and that the running and operating the tannery, in a proper and workmanlike manner and with bark received under the contract with Griffin, had actually resulted in a loss down to January 14, 1880, near the commencement of the trial. The necessities of the case are not such as to justify the opinions. All the facts of any value can be stated and placed before the court, and from them the disinterested triers of fact can draw inferences and make up judgments better than witnesses generally friendly, to if not biased in favor of, the party calling them. The defendants could evidently find as many witnesses to swear that no profits could be made, as the plaintiff could to swear that profits could be made, and thus the ultimate conclusion as to profits and damages would after all have to be based upon the facts stated. In this case all the facts should be proved, and with the aid of the light which subsequent events have shed upon the value of this agreement, the trial court will be able to reach a conclusion as to such value more reliable and satisfactory than the opinions of witnesses. We refer, for a fuller statement of our views as to the proof and rules of damages, to the case of *Wakeman v. Wheeler & Wilson Manufacturing Company*, just decided by us.* The opinion in that case is quite applicable to this and sufficient authority for the conclusion we here reach.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

* *Ante*, p. 205.

Statement of case.

BERTRAND CLOVER, JR., Respondent, v. THE GREENWICH INSURANCE CO. OF THE CITY OF NEW YORK, Appellant.

101	277
152	135
101	277
156	85

Where it affirmatively appears that an erroneous charge could not have affected the verdict it is not ground for reversal.

A policy of fire insurance required proofs of loss to be made within thirty days after a fire, and provided that the loss should be payable sixty days after notice thereof and proofs of loss have been received by the company; it also provided that in case of differences in regard to the loss or damage they should be submitted to arbitrators. In an action upon the policy, *held*, that the words "proofs of loss," in the clause in regard to payment, referred to the proofs to be furnished within thirty days, and that an action brought three days after an award by arbitrators, appointed as provided by the policy, but more than sixty days after proofs of loss were served, was not prematurely brought.

The insurance was upon plaintiff's interest, which was an undivided half of the buildings insured. An allowance was made by the arbitrators for the expense of removing the machinery in the buildings preparatory to the work of repair. Defendant offered to prove that plaintiff's co-tenant had received an award from other insurance companies, in which was included the expense of removing the machinery. *Held*, that the evidence was properly rejected, as the proof would not affect defendant's liability.

The policy contained a clause providing that it should be optional for defendant to repair or rebuild within a reasonable time, giving notice of its intention so to do within sixty days after completion of the proofs of loss therein required. Defendant, on the next day after the award, refused to pay; it offered to prove that three days thereafter it offered to repair; this was rejected. *Held* no error; that the proofs referred to in the clause in reference to repairs were the proofs required to be furnished within thirty days, not to any subsequent proceedings, to ascertain amount of loss; and that the option terminated when a right of action accrued to plaintiff upon the policy.

The policy provided "that the cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured * * * of replacing it." *Held*, this provision assumed that the ascertainment of the cost of replacing is a legitimate method of determining the amount of damages; and that an allowance for the expense of removing machinery from the building preparatory to making repairs was proper; also, as the fact that the machinery belonged to some other person did not necessarily exempt the insured from the necessity and cost of removing it, that fact alone did not prevent such an allowance; also, that the existence of a contract between plaintiff and other persons by which

Statement of case.

he could compel them to remove the machinery did not diminish defendant's liability.

(Argued December 18, 1885 ; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 11, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This was an action upon a policy of insurance against loss by fire upon plaintiff's "undivided one-half interest" in certain buildings used as a saw and file factory.

The policy contained these clauses among others :

"The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proof of the same, received at the office, made by the assured, in accordance with the terms and provisions of this policy, unless the property be replaced, or the company have given notice of their intention to rebuild or repair the damaged premises."

"Persons sustaining loss or damage by fire shall forthwith give notice, in writing, of said loss to this company, and within thirty days after the fire a particular statement of the loss shall be rendered to this company, signed and sworn to by the assured. * * * The assured shall, whenever required, submit to an examination or examinations under oath by any person appointed by this company, and subscribe to such examinations when reduced to writing, and shall also, as often as required, produce their books of account and other vouchers, and exhibit the same for examination either at the office of this company or such other place as may be named by its agent, and permit extracts and copies thereof to be made."

"In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, whose award in writing shall be binding on the parties as the amount of such loss or damage, but shall not decide the liability of the company under this policy ; and

Statement of case.

it shall be optional with the company to repair, rebuild or replace the property lost or damaged, with other of like kind and quality, within a reasonable time, giving notice of their intention so to do within sixty days after the completion of the proofs herein required."

"The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value."

"It is furthermore hereby provided and mutually agreed, that no suit or action against this company, for the recovery of any claim, by virtue of this policy, shall be sustainable in any court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next ensuing after the loss shall occur, exclusive of any time consumed in arbitration; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, whether the *amount* of loss has or has not been adjusted, any statute of limitation to the contrary notwithstanding."

A fire occurred April 18, 1882. Plaintiff presented proofs of loss May 17, 1882. The parties not agreeing as to amount of loss, arbitrators were selected as prescribed by the policy, who, on September 5, 1882, made an award. On the next day defendant's secretary notified plaintiff's attorney that it would not pay. On September ninth this action was commenced.

The further material facts appear in the opinion.

Adrian H. Joline for appellant. If arbitrators take into consideration matters not submitted to them their award is void and the fact may be shown by parol testimony, even by that of the arbitrators in an action at law upon the award. (*Butler v.*

Opinion of the Court, per RUGER, Ch. J.

Mayor, etc., 7 Hill, 329; *S. C.*, 1 Barb. 325; *Briggs v. Smith*, 20 id. 409; *People, ex rel. Wasson, v. Schuyler*, 69 N. Y. 242, 247; *Bouvine v. Milbank*, 5 Abb. Pr. 28; Morse on Arbit. and Award, 178, 181, 182, 186, 192, 213, 214; *Dalrymple v. Town of Wittingham*, 26 Vt. 345.) The court erred in excluding proof of the offer of the company to rebuild and plaintiff's refusal to permit rebuilding. (*Bals v. Home Ins. Co.*, 36 Barb. 614; affirmed, Court of Appeals, 36 N. Y. 522; *Morrell v. Irving Fire Ins. Co.*, 33 id. 429.) In order to constitute a waiver there must be evidence justifying a finding that with full knowledge of the facts there was an intention to abandon or not to insist upon the point claimed to be waived, or that it was purposely concealed under circumstances calculated to and which actually did mislead the other party to his injury. (*Devens v. Mech. & Traders' Ins. Co.*, 83 N. Y. 168.) Where special damages are alleged, but there is no proof of general damage, it is error to charge that the jury may give general damages. (*Vanderslice v. Newton*, 4 N. Y. 130.) The appraisal does not waive any of the other clauses of the policy, for it is binding only as to the amount of loss or damage. (*Gilligan v. Com. Ins. Co.*, 20 Hun, 93.)

A. J. Perry for respondent.

RUGER, Ch. J. There were two items of evidence, only, upon which the verdict of the jury with respect to the amount of damages, could have been based, viz.: (1) The award of the arbitrators assessing it at \$1,225, and (2) the proofs of loss in which it was stated to be \$1,250. The court in charging the jury directed them to bring in a verdict for the amount appraised by the arbitrators, with interest from September 5, 1882, in case they should find that the arbitrators had not exceeded their authority, in making the award. The jury found for that sum, and the inference is quite conclusive that their verdict was founded upon the evidence furnished by the award, and not upon that contained in the proofs of loss. It is evident, therefore, that the defendant was not injured by the charge

of the trial judge to the effect, that if the jury found that the arbitrators exceeded their authority in making the appraisal of damages, the plaintiff was entitled to whatever damage he had suffered by the loss in question. There being no legal evidence of the amount of such damages, aside from the appraisal, an exception to the charge would have been fatal to the judgment, but for the fact that it affirmatively appears that it did not influence the verdict. (*Thorne v. Turck*, 94 N. Y. 90.)

The objection that the action was prematurely brought is not sustainable. The policy provides that the loss shall be payable, sixty days after due notice thereof, and proofs of the same, are received by the insurers. This clause evidently refers to the proofs of loss, required by the policy to be made by the insured, within thirty days after the fire, and not to any act of the plaintiff which might, or might not, be thereafter required of him, under the policy, by the insurers. The clause providing that the one year limitation, shall run against the assured, notwithstanding the pendency of proceedings to appraise damages, might otherwise enable the insurers by inaction and delay, to retard, if not defeat, any recovery on the policy. The provision authorizing an extension of the time of payment of a loss, until after certain proofs, declarations and certificates, are produced, seems to exclude the hypothesis that the defendant was also to have sixty additional days delay, after such proofs had been made. This provision contemplates a postponement of the right to bring an action only, until such proofs are made, and rebuts the inference that any longer delay was intended.

The action was not commenced until September 9, 1882, nearly four months after proofs of loss were served, and several days after the completion of the award of the appraisers, and was not, we think, prematurely brought. Neither, did the court commit any error in excluding the defendant's offer to show that the plaintiff's co-tenant had received an award, from other insurance companies, for a loss upon his individual interest in the property damaged, which included the expense of removing

Opinion of the Court, per RUGER, Ch. J.

the machinery, preparatory to the work of repairing the real property injured. That fact did not affect the liability of the defendant upon its policy to the plaintiff, and he was entitled to recover whatever it might be necessary for him to pay, in the restoration of the interest insured, to its original condition. The sole question in this case in respect to the item objected to is, whether the plaintiff might be subjected to the expense of making the removal referred to. This question was not affected by a proceeding between strangers to this action, in which the plaintiff took no part and had no interest, but was to be determined by the provisions of his policy.

As a defense to the action, the defendant offered to prove that on the 9th of September, 1882, it served upon the plaintiff a written offer, electing to rebuild or repair the property damaged. It then appeared in proof, that on the sixth day of September the defendant had refused to pay the award in question, and that nearly four months had elapsed since the service of the proofs of loss. The evidence was objected to and excluded by the court, to which ruling the defendant excepted. This evidence was claimed to be admissible, under the clause in the policy, providing that it should be optional with the company, to repair or rebuild the property damaged within a reasonable time, giving notice of their intention so to do, within sixty days after the completion of the proofs therein required. The proofs therein referred to are evidently the proofs of loss, unconditionally required to be made by the assured, according to the terms of the policy, and do not refer to the subsequent optional proceedings provided by the policy, for ascertaining the amount of a loss, which may or may not be required to be taken, in any given case. It would be an unreasonable construction of this contract, to extend the exemption of the defendant from suit, and give it a right to defeat an action already brought, to a period which it had the power to prolong indefinitely, even to the running of the limitation, provided by the policies in favor of the insurers. The words "proofs" and "proofs of loss" are used indiscriminately in several places in the policy, and wherever used, obviously refer to the particular statement of the loss re-

quired by the policy to be signed and sworn to by the assured within thirty days after the fire. Any other construction would involve the manifest absurdity of giving the assured a vested cause of action for his loss, and the defendant an indefinite right to defeat it, by a subsequent election to repair or rebuild the property damaged. We think this option, terminated when a right of action accrued to the assured, upon the policy by the expiration of the sixty days period of limitation, and the other express limitations therein provided.

The only remaining exception of any importance is that taken to the refusal of the court to direct a verdict in the defendant's favor upon the ground that the arbitrators exceeded their authority, in making their award. The court charged the jury that the arbitrators had no authority to go outside of the subject-matter submitted to them, and if they did so, their appraisal was not binding upon the parties. This direction was manifestly correct, unless there was undisputed evidence of an unlawful exercise of authority by the appraisers. We do not find such evidence in the case. The proof was in some respects obscure and conflicting, but we do not find any conclusive evidence that the arbitrators included in their award any item of damage not properly chargeable under the policy, to the defendant. The award was made for a gross sum, and nothing therein, shows the detailed items, of which it was composed. This was attempted to be established by the testimony of the appraisers, and proof of admissions made by one of them. There was no item of damage questioned by the defendant which was indisputably included therein, except that of the expense of removing machinery preparatory to making repairs. As we have already seen, such removal was a necessity in the work of restoring the premises to their original condition, and an allowance for its expense is clearly contemplated by the terms of the policy, providing that the cash value of the damaged property should not exceed the cost to the assured of replacing it. This provision seems to assume that the ascertainment of the cost of replacing, is a legitimate method of determining the amount of the damage. The fact that such machinery

Statement of case.

wholly belonged to some other person, did not necessarily exempt the plaintiff from the necessity and cost of making its removal. Even if the plaintiff had the right to require the owners to effect its removal, he was under no legal duty to await their action in doing so, or to enforce such right against them for the benefit of the defendant.

The existence of a contract between the plaintiff and other persons by which he could compel such persons to effect such removal, did not diminish the liability of the defendant upon its policy. If the removal was a necessity of the repairs required to be made, and the policy indemnified the plaintiff for the expense of making such repairs, it would seem that the consideration of the amount of such expense, was within the authority conferred upon the appraisers.

The point taken upon an attempted distinction between damages to flues and chimney is not justified by the evidence. The witnesses use the words indifferently and sometimes alternately, and the evidence fails to show affirmatively that the appraisers awarded for any loss in respect thereto which was not incurred.

The judgment should be affirmed.

All concur.

Judgment affirmed.

101	284
121	18
101	284
135	408
101	284
146	248

FERDINAND MAYER, Appellant and Respondent, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant and Respondent.

Errors and irregularities in assessments for street openings in the city of New York must be corrected and reviewed in the proceedings themselves; they cannot be reached by a collateral action in equity. An order confirming the assessment has the force and conclusiveness of a judgment. The provision of the Consolidation Act (§ 897, chap. 410, Laws of 1882), declaring that no suit in equity or otherwise "shall be commenced for the vacation of any assessment in said city," is not limited to any particular class, but applies to every assessment.

Statement of case.

The expenses of opening a street were assessed partly upon the property benefited and partly upon the city at large. After the confirmation of the report of the commissioners, in which was included an item for their fees and expenses, the city resisted that claim and succeeded in effecting a settlement by which the item was largely reduced. *Held*, that an owner of property assessed was entitled to maintain an action in equity to compel the application, upon his assessment of a *pro rata* share of the amount saved; but that he was liable to interest from the date of the assessment; this being in no manner affected as a complete and binding adjudication by the allowance, which was simply in the nature of a credit to be applied on a conceded debt.

(Argued December 18, 1885; decided January 19, 1886.)

THESE were cross-appeals from different portions of a judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 13, 1883, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 28 Hun, 587.)

This action was brought to compel the reduction of an assessment upon lands of the plaintiff, situate in the city of New York, for the expenses of widening and straightening Broadway in said city.

The material facts are stated in the opinion.

John C. Shaw for plaintiff. The commissioners appointed under the acts in relation to opening streets in New York city are entitled to their fees and expenses when earned, without waiting for the confirmation of their report. (*In re Fourth Aves.*, 3 Wend. 452; *Blunt v. Mayor, etc.*, 9 Hun, 330; *In re Parade Ground*, 60 N. Y. 319; *In re Central Park Com'r*, 63 Barb. 282.) This action for equitable relief is not within the prohibition of chapter 312 of the Laws of 1874, which provided that thereafter "no suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title, but owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the act hereby amended." (Laws of 1858, chap. 338; *In re Arnold*, 60 N.

Statement of case.

Y. 26.) While an equity action can be maintained for relief against an assessment because of matter outside the assessment, it is not in such a case an action to remove a cloud on title or to vacate an assessment; it is an action to restrain the collection of an assessment. (*Eno v. Mayor, etc.*, 68 N. Y. 214.) A bill in equity to vacate an assessment must allege some defect, either patent or latent, in the proceedings which resulted in the assessment — some act committed in the course of the proceedings which was contrary to the statutory provisions on the subject. (*Astor v. Mayor, etc.*, 62 N. Y. 580; *Nolan v. Mayor, etc.*, id. 472; *Strasburgh v. Mayor, etc.*, 87 id. 452.) The quasi judgment in the case of an assessment when it is confirmed by a judicial tribunal is subject to the same rules of equitable relief as all other judgments. (*Dolan v. Mayor, etc.*, 62 N. Y. 472-475; Story's Eq. Jur. [12th ed.], §§ 316, 1572; *Paddock v. Palmer*, 19 Vt. 581; De Colyar on Guaranties, 236; *Bonney v. Seely*, 2 Wend. 482.) The plaintiff being entitled to a reduction of the principal of the assessment, interest can only be charged from the time when it is ascertained what amount is legally due. (*St. Joseph's Asylum*, 69 N. Y. 353; *In re Pelton*, 85 id. 652; *In re Miller*, 24 Hun. 637; *In re Lowden*, 25 id. 434; affirmed, 89 N. Y. 548.)

D. J. Dean for respondent. The confirmation of the commissioners' report by the Supreme Court is a judgment which, remaining unreversed, concludes plaintiff from recovering under the facts alleged and proved. (Laws of 1869, chap. 890; *N. Y. C. R. R. Co. v. Marvin*, 1 Kern. 276; *Canal & Walker Sts.*, 2 id. 406; *Bowery Ex. Case*, 2 Abb. 368; *In re Arnold*, 60 N. Y. 26; *In re Com'rs Cent. Park*, 50 id. 493; *Dolan v. Mayor, etc.*, 62 id. 472; *King v. Mayor, etc.*, 36 id. 182; *Embury v. Conner*, 3 id. 512; *Astor v. Mayor, etc.*, 62 id. 580; *Mayor, etc., v. Erben*, 38 id. 311; *Dobson v. Pearce*, 12 id. 164; *Homer v. Fish*, 1 Pick. 435; *Wilkes v. Mayor, etc.*, 79 N. Y. 621; *M. E. Ch. v. Mayor, etc.*, 55 How. Pr. 57.) The mere fact that the city has succeeded in reducing the assessment against it does not inure to the benefit of another

Opinion of the Court, per FINCH, J.

assessed person and entitle him to similar relief. (*In re Delancey*, 52 N. Y. 80; *Horn's Case*, 12 Abb. 124; *In re Broadway Widening*, 49 N. Y. 150.) Even if the action were maintainable upon common-law principles, the court is expressly deprived of jurisdiction to administer the relief sought. (Laws of 1874, chap. 312, § 2; Laws of 1874, chap. 313, § 1; *Lennon v. Mayor, etc.*, 55 N. Y. 366; *Dolan v. Mayor, etc.*, 62 id. 472; *Astor v. Mayor, etc.*, id. 580.) Chapter 312 of the Laws of 1874 applies to assessments for street openings as well as for local improvements. (62 N. Y. 591; *Strusburgh v. Mayor, etc.*, 87 id. 455; *Knapp v. City of Brooklyn*, 97 id. 523.)

FINCH, J. Both parties appeal from the order of the General Term; the city, from so much of it as applies upon the assessment a *pro rata* share of the amount saved from commissioner's fees; and the plaintiff, from that part of it which leaves interest to run from the beginning of the liability instead of from the date at which the true amount to be collected is ascertained. The plaintiff alleged that after the confirmation of the report of the commissioners, which fixed and established the assessment, partly upon property benefited, and partly upon the city at large, and in which was included an item of \$165,632.40 for commissioners' fees and expenses, the city resisted that claim and succeeded in effecting a settlement by a reduction of the charge to \$97,531.82, which saving was alleged to be two and one-fifth per cent of the aggregate assessment; that the amount charged upon plaintiff's property was \$10,928, and the proper assessment payable is \$10,687.59; that such sum was duly tendered and refused, whereby an invalid and improper lien remains. The specific relief sought was that the whole original assessment be modified by deducting the total amount saved; that plaintiff's assessment be reformed by deducting its *pro rata* share of the amount saved; that the assessment be canceled and discharged; that interest be computed only from the entry of judgment in the action; and then for further or other relief. It is evident that all the specific relief sought went

Opinion of the Court, per FINCH, J.

upon the basis that the assessment should be vacated in whole or in part. But when confirmed it had the force and conclusiveness of a judgment, and the plaintiff alleges against it neither fraud nor mistake. (*In the Matter of Arnold*, 60 N. Y. 26.) In street opening cases the confirmation is by the court; and after a hearing of all parties interested, or an opportunity to be heard, it becomes in effect a judgment of the court, which cannot be attacked in a collateral action except for reasons not alleged in this action. Errors and irregularities in street opening cases must be corrected and reviewed in the proceedings themselves, and cannot be reached by a collateral action in equity. (*Dolan v. Mayor, etc.*, 62 N. Y. 472; *Astor v. Mayor, etc.*, id. 580.) There is another difficulty. Section 897 of the Consolidation Act forbids a suit in equity to vacate any assessment in the city, or remove a cloud on title. Whatever may have been true of the original act of 1858, the section in question, as it now stands, is broad and unqualified, applying to every assessment in the city, and cannot be restrained or limited to a particular class. The plaintiff, therefore, was not entitled to his specific relief; but he seeks other remedy and puts his action upon another ground. Abandoning all claim to vacate or modify the assessment, and leaving it to stand as final and conclusive, he claims that he is entitled in equity to compel the application upon his assessment as *pro tanto* a payment of the same, of his *pro rata* share or proportion of the amount saved by the city. There is unmistakable justice in that. There was an apportionment of the entire cost of the street opening between the city and the benefited locality, the latter paying a little more than one-half. Practically this apportionment was made between the tax payers at large and those of the described locality. Any saving from the cost and expense equitably should reduce the burden of both, and there is no just reason for applying it wholly to the relief of those burdened the least. That the municipality, by the action of its officers, secured the saving does not alter the case. The city in its action was trustee for all the tax payers affected, and acted in behalf of all. This plaintiff was among them, and is entitled to reap his just

Statement of case.

proportion of the benefit secured by the corporate authorities, and by an action in equity may enforce the performance of that trust duty. This view the General Term adopted; and it follows logically from it that the plaintiff remained liable for the interest from the date of the assessment. That is in no manner affected as a complete and binding adjudication. The cases relied on by the plaintiff were all cases in which the assessment itself was modified and changed, and never became final until then; and before such final result, the tax payer could not know what the assessment in fact was; but here there never was any change in it, or any uncertainty about it. The plaintiff's right assumes its entire validity, and rests wholly upon an after occurrence which furnishes him with a credit to be applied on his conceded debt. The sum to be applied on plaintiff's debt was found as a fact, and no question challenging it appears to have been raised on the trial. The tender was too small.

The judgment of the General Term should be affirmed, without costs to either party.

All concur.

Judgment affirmed.

EDWARD EVANS et al., Respondents, v. CONRAD BACKER et al., Appellants.

The omission to indorse upon a paper served the post-office address or place of business of the attorney, as required by the General Rule of Practice (No. 2), is a mere irregularity and does not necessarily vitiate either the paper or its service.

It seems the omission entitles the party served either to return the paper or move to set it aside, but after receiving it without objection he may not safely disregard it.

As a general rule it is the office of the Supreme Court to administer its own regulations, and in its discretion to impose such penalties as may have been incurred by attorneys through neglect to comply with those regulations or to relieve therefrom.

In an action upon an undertaking given upon appeal, the defense was that no written notice of the entry of the order or judgment affirming the

Statement of case.

judgment appealed from was served ten days prior to the commencement of the action, as required by the Code of Civil Procedure (§ 1309); a notice was served, subscribed, and indorsed by the attorney, but the indorsement did not state his post-office address or place of business. The appellant's attorney received and retained the notice and admitted service thereof. *Held*, that a decision of the General Term to the effect that the acceptance and retention of the notice was a waiver of the irregularity was justified and was not reviewable here. *Kelly v. Sheehan* (76 N. Y. 325), *Kilmer v. Hathorn* (78 id. 228), *Roe v. Beach* (76 id. 164), distinguished.

(Submitted December 18, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the fifth judicial department, made April 14, 1883, which reversed a judgment in favor of defendants, entered upon a decision of the court on trial without a jury, and which granted a new trial.

This action was upon an undertaking given on appeal.

The defense was that no written notice of the entry of the order, or judgment affirming the judgment appealed from, was served upon the appellants' attorney ten days before the commencement of this action as required by section 1309 of the Code of Civil Procedure. It appeared that written notice of the entry of the judgment of affirmance, signed by the respondents' attorney, and indorsed with his name, but without stating his post-office address or place of business, was served, which was received and retained by appellants' attorney, who gave a written admission of service. The trial court held that this was not a legal notice, and dismissed the complaint.

E. C. Sprague for appellants. The complaint was properly dismissed, the written notice of entry of judgment of affirmance required by law not having been served. (Code of Civ. Pro., §§ 1309, 1325, 1351; rule 2, Sup. Ct.; *Roe v. Beach*, 76 N. Y. 164; *Porter v. Kingsbury*, 71 id. 588; 1 Wait's Pr. 463; 4 id. 628.) The fact that the notice served was not subscribed or indorsed with the post-office address or place of business of the attorney, as required by rule 2, is fatal to it. (*Kelly v. Sheehan*, 76 N. Y. 325; *Kilmer v. Hathorn*, 78 id. 228;

Yorks v. Peck, 17 How. 192; *Langdon v. Evans*, 29 Hun, 652; *Valton v. Assurance Soc.*, 19 How. Pr. 515; *Andrews v. Durant*, 6 id. 191; *Dent v. Watkins*, 49 id. 275; *Wood v. Fisk*, 63 N. Y. 250.) The defendants' right to object to the notice as defective has not been waived. (*Roe v. Beach*, 76 N. Y. 164; *Hatch v. Elkins*, 65 id. 496; *Francis v. Litts*, 2 Hill, 362; 4 Wait's Pr. 623; Code of Civ. Pro., § 434.)

George Wing for respondents. The defect in the notice was an irregularity which the party entitled to the notice could and did waive. (*Holmes v. Russell*, 9 Dowl. 487; *Clapp v. Graves*, 26 N. Y. 418.) The notice should have been returned at once and the defect pointed out. (*Broadway Bk. v. Danforth*, 7 How. Pr. 264; *Sawyer v. Schoonmaker*, 8 id. 198; *Straub v. Parker*, 9 id. 342; *Corbin v. George*, 2 Abb. 465.) So far as rule 2 varies or changes the rights or obligations of a plaintiff in a suit upon an undertaking from the obligations imposed by the statute, it is in conflict with the statute and consequently inoperative. (*Glenny v. Studwell*, 64 N. Y. 120; *People v. Nichols*, 79 id. 582; *Gormley v. McGlynn*, 84 id. 286; *Kilmer v. Hathorn*, 78 id. 228.) The rules of the Supreme Court are under its control and are to be enforced and administered by it. It can overlook or relieve against a violation of them or a non-compliance with them, and its determination is not under ordinary circumstances reviewable. (*Martin v. Lowenstein*, 68 N. Y. 456.)

RUGER, Ch. J. The omission to indorse upon papers served or filed, the post-office address or place of business, of the attorney serving them, as required by No. 2 of the Supreme Court Rules, is a mere irregularity and does not necessarily vitiate either the paper or its service. (*Clapp v. Graves*, 26 N. Y. 418.) Such omission entitles the party served, either to return the paper or move to set it aside, but he cannot, after receiving it without objection, safely disregard the office, which the paper is designed to fill. In *Kelly v. Sheehan* (76 N. Y. 325), this court held that an omission to make such indorse-

ment upon a notice of the entry of judgment which was intended to limit the right of appeal, rendered it ineffectual for that purpose. It was there held that a notice, upon which it was intended to build a claim, for a penalty or forfeiture, must be regular in every respect, and that in such case the party should be held to strict practice. The reason of this decision is quite obvious, and does not require the extension of its principle to cases not within its spirit. In *Kilmer v. Hathorn* (78 N. Y. 228, 230), the objection was described as a technicality, and its use in that case, was justified upon the ground that it defeated a point equally technical raised by the adverse party. The case of *Rae v. Beach* (76 N. Y. 164) is not an authority on the point. The notice in that case did not give the information which is expressly required by statute as the condition of the maintenance of the action, viz., the entry of the order or judgment.

- The Supreme Court rule in question does not prescribe the consequence or penalty for a violation of its requirements. It is peculiarly the province of the body framing them, to interpret its own enactments, and as a general rule we have considered it the office of the Supreme Court to construe and administer its own regulations, and in their discretion, to impose such penalties and relieve from such defaults as may have been suffered or incurred by attorneys, through neglect to comply with its modes of procedure. (*Martine v. Lowenstein*, 68 N. Y. 456.)

In the exercise of their office, they have determined in this case, that the omission to comply with rule 2 was a mere irregularity, capable of being waived and not affecting the object intended to be accomplished, by the service of the notice in question. We are not disposed to disturb that decision of the question.

Of course, the requirement of ten days written notice of the entry of judgment, or order, affirming a judgment, provided by section 1309 of the Code of Civil Procedure, as the condition of an action against the sureties, upon an undertaking on appeal, is fundamental and cannot, in any essential particular, be safely

Opinion of the Court, per RUGER, Ch. J.

disregarded. But this requirement has been fully complied with in this case, and the attorney has been informed of every particular contemplated by the statute. The notice served satisfied its object, and fully performed the office designed for it, and there is no justice in saying, because the attorney has disregarded a rule, intended solely to promote the convenience of the opposite attorney, and having no reference to the object of the notice, that, therefore, a meritorious action commenced and prosecuted in strict conformity to the statute giving it, shall be defeated. It would be a perversion of its object and design, and contrary to established rules of interpretation to give it the construction claimed by the appellants. As was said in *Rae v. Beach* (*supra*), the notice of entry of judgment, being required by statute for the benefit of the party, it is not competent for the attorney to waive a compliance with it. The court rule, however, being intended for the benefit of the attorney alone, there is no reason why he may not waive its performance, and by accepting and retaining the notice we think he has done so.

The fact that the defendants are sureties works no change in the aspect of the question. Their covenant was to perform their undertaking, upon condition that the judgment appealed from was affirmed, and ten days notice thereof should be given to the attorney for the appellants before action brought. These conditions have been strictly complied with, and they are not entitled to claim the benefit of a rule, not designed for their protection, and in the enforcement of which they are not interested.

We have found no case in this court conflicting with the determination of the General Term, and we think it conforms to the real meaning and intent of the rule in question.

The order of the General Term should, therefore, be affirmed and judgment absolute ordered for the plaintiffs.

All concur.

Order affirmed and judgment accordingly.

Statement of case.

SARAH L. TINGUE, Respondent, v. THE VILLAGE OF PORT CHESTER et al., Appellants.

In an action to restrain the sale of land for non-payment of an assessment for a local improvement and to set aside the assessment because of alleged invalidity in the proceedings, the burden is upon plaintiff to establish the invalidity complained of. There is no presumption in such an action that municipal authorities have acted illegally or that conditions precedent have not been performed.

Where, therefore, in an action to restrain the sale of plaintiff's lot in the village of Port Chester, and to set aside an assessment thereon for grading a street, it appeared that the charter of the village (§ 4, tit. 5, chap. 818, Laws of 1888) requires the petition for laying out a street to be signed by persons owning land on the line thereof, but does not require the fact of such ownership to be stated in the petition. *Held*, the fact that the petition for opening the street in question did not show on its face that the persons signing it were such owners did not tend to negative their ownership; and, in the absence of other proof, that the invalidity of the proceedings in this respect was not established.

The distinction between such a case and one where the owner of a tax title seeks to enforce it by action pointed out.

Also *held*, that as to other objections which related to matters which might have been corrected on appeal from the report of commissioners, plaintiff was foreclosed by the order of confirmation.

Also *held*, as it appeared that the parties interested in the lands taken for the street, and among them plaintiff's grantor, who then owned the lot, accepted the awards made to them, and acquiesced in the proceeding, he was concluded from alleging irregularities therein.

Also *held*, the fact that the specifications upon which the bids for grading were based embraced another street as well as the one in question was immaterial, it appearing that profile maps showing the amount and kind of excavation and filling required on each street were separately made and filed with the specifications.

Also *held*, that the charter (§ 23, tit. 5) did not require the trustees of the village to pass upon the bids at the time of opening them; that time for comparison of the bids and calculation to determine which was most preferable was essential and might be taken.

It was objected that the notice of the meeting of the trustees to act in respect to the grading did not describe the district of assessment with sufficient accuracy. The street had then been laid out and the map and report of the commissioners filed. The notice referred to the street by its name and described the assessment district as including "all the lands on both sides of said street to a depth not exceeding one hundred feet. *Held*, that this was a substantial compliance with the charter (§ 23, tit. 5).

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Statement of case.

This was a reassessment; the original assessment made in March, 1874, having been declared invalid and set aside (71 N. Y. 309). *Held*, that there was no legal or valid authority to make a reassessment; that no such authority was conferred by the original charter; that the provision in the act of 1877, amending the charter (Chap. 227, Laws of 1877), which authorized reassessments in certain cases where prior assessments had been set aside or held invalid, only applied to assessments so set aside or held illegal after the passage of the act, and that the act of 1878 (Chap. 277, Laws of 1878), which attempted to authorize reassessments in cases of assessments set aside or vacated, before as well as after the passage of the act, was void as in contravention of the provision of the State Constitution (Art. 3, § 16), directing that a local or private bill shall embrace but one subject, and that shall be expressed in the title.

(Argued December 21, 1885 ; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 15, 1883, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are set forth in the opinion.

Edward Wells for appellants. Neither the charter of the village nor the law of highways requires the line or route of the road to be particularly defined by course and distance in the application. (*Hallock v. Woolsey*, 23 Wend. 328.) Whether the petitioners were owners cannot be inquired into collaterally. (*Van Steenburgh v. Bigelow*, 3 Wend. 42, 46.) Where the meaning is plain in a contract or law, and the sense requires it, the court will substitute one word or number for another, or even transpose or rearrange sentences. (2 Pars. Con. [4th ed.] 15.) The one only object of the act of 1878 was to amend the charter of Port Chester, and that is expressed in the title. (*Greaton v. Griffin*, 4 Abb. Pr. 310; *Woodson v. Murdock*, 22 Wall. [U. S.] 351, 373; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. City of Rochester*, 50 id. 525.) It is the duty of the courts so to construe as to meet the mischief and advance the remedy, and not to violate fundamental principles. (*Hart*

Statement of case.

v. *Cleiss*, 8 Johns. 41; *Walker v. Harris*, 20 Wend. 555-562; *Watervliet T. Co. v. McKean*, 6 Hill, 616.) Plaintiff is estopped from denying the avenue to be a highway, by standing by and seeing expenses and cost of grading incurred without making any objection, while the grading was in progress. (*McGowan's Case*, 8 Weekly Dig. 461.)

Calvin Frost and *Ralph E. Prime* for respondent. Proceedings to lay out a street and those for the grading of a street are statutory proceedings, each attacking the property rights of the citizen, and each must be strictly pursued, and the record must show the statutory requirements complied with, the jurisdiction obtained and kept step by step, and the record cannot be helped by intendment or by any presumptions. (*Sharp v. Johnson*, 4 Hill, 98; *Miller v. Brown*, 56 N. Y. 383; *Matter of Second Ave. M. E. Church*, 66 id. 395; *Hopkins v. Mason*, 42 How. 115; *Merritt v. Port Chester*, 71 N. Y. 309; *Adriance v. McCafferty*, 2 Rob. 153; *Matter of N. Y. & B. R. R.*, 62 Barb. 85; *Walkill V. R. R. v. Norton*, 12 Abb. [N. S.] 317.) Presumption does not supply the lack of proof. (*Miller v. Brown*, 56 N. Y. 383, 386; *Commissioners of Cohoes v. Lansing*, 45 id. 19; *People v. Commissioners of Hempstead*, 7 Hun, 17; *Matter of Buffalo*, 78 N. Y. 362, 366.) The burden is upon defendants to show that the petition was signed by the required number of qualified persons. (*Sharp v. Johnson*, 4 Hill, 98.) The owners were entitled to be heard by the court on the appointment of commissioners. (Chap. 818, tit. 5, p. 4; *Matter of Mayor, etc., and Manhattan Co.*, 1 Caines, 507; *In re Cambria Street*, 75 Penn. St. 357.) The whole proceeding is illegal because of the bad oath. (*Merritt v. Port Chester*, 71 N. Y. 309; *People v. Connor*, 46 Barb. 333; *State v. Jersey City*, 38 N. J. L. 85; *State v. Perth Amboy*, 2 id. 425; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Matter of Mayor and Manhattan Company*, 1 Caines, 507.) The right of entry to grade the street or to do any thing, was not obtained until the end of a chain of acts, all to be performed according to the order, manner and form of the statute; until then every entry

Opinion of the Court, per ANDREWS, J.

was a trespass. (*Matter of Rhinelanders*, 68 N. Y. 105, 108; *Matter of Cheeseboro*, 78 id. 232, 238; *Boyle v. Brooklyn*, 71 id. 1; *People v. Haines*, 49 id. 587.) Nor could the legislature, after the constitutional amendment of 1875, lay out a street, or provide for laying out a street, or delegate the power to create a debt or charge which did not in law exist, and it was powerless to charge this illegal debt on the land-owners, by the way of a reassessment without their consent. (*Horton v. Thompson*, 71 N. Y. 513; Const., art. 3, pp. 18, 20.) The act of 1878 (Chap. 277), so far as it was thereby attempted to change the act of 1877, is unconstitutional and void. It was a local act. (*People v. Hill*, 35 N. Y. 449; *People v. Allen*, 42 id. 404; *People v. Briggs*, 50 id. 553; *Fishkill v. R. R. Co.*, 22 Barb. 634; *Smith v. Mayor, etc.*, 34 How. 508; *People v. Brinkerhoff*, 63 N. Y. 265; *Mayor, etc., v. Colgate*, 12 id. 146; *Sun Co. v. Mayor, etc.*, 8 id. 253.) Conditions precedent in proceedings of this kind must be literally followed. (*Adriance v. McCafferty*, 2 Rob. 153.) The particular lot and the situation of each parcel and its peculiar circumstances were to be considered. (*Matter of Degraw St.*, 18 Wend. 568; *Watkins v. Zwietusch*, 47 Wis. 573.) The assessment being paid, it cannot be set aside. It is extinguished, and naught left to be set aside. (*In re Lima*, 77 N. Y. 170.)

ANDREWS, J. This is an equitable action, brought to restrain a sale of plaintiff's lot in the village of Port Chester, for the non-payment of an assessment laid for grading a street in the village, called Irving avenue, and to vacate the assessment. Irving avenue was laid out and declared a public street by resolution of the trustees of the village, passed June 2, 1873, under proceedings initiated November 11, 1872, upon the petition of eight persons, recited in the petition to be residents and tax payers of the village. The charter of Port Chester (Laws of 1868, chap. 818, tit. 5) authorizes the trustees of the village, under the restrictions and limitations therein prescribed, to cause streets and avenues within the village to be laid out, opened and graded, and to assess the expense thereof upon the

Opinion of the Court, per ANDREWS, J.

property benefited. The proceedings for grading Irving avenue, were commenced June 2, 1873, the same day on which it was declared by the resolution of the trustees to be a public street. Commissioners were appointed to assess the expense of the grading, bids were received for the work, and contracts therefor were let, and the report of the commissioners was made March 7, 1874, and confirmed March 9, 1874. The original assessment was subsequently set aside and held to be invalid for reasons stated in the opinion in *Merritt v. Village of Port Chester* (71 N. Y. 309). Afterward the legislature passed two acts amending the charter of the village, being chapter 227 of the Laws of 1877, and chapter 277 of the Laws of 1878. The trustees after the passage of these acts, took proceedings for a reassessment, and the report of the commissioners appointed to make the reassessment was confirmed September 8, 1879. This second assessment is the one assailed and sought to be set aside in this action.

The complaint challenges the validity of nearly every step taken in the proceedings in respect to Irving avenue, from their inception. It alleges that the avenue was never legally laid out, that the proceedings for grading were not in conformity to the charter and were void, and that if the street was legally laid out and graded, the reassessment of the expense of grading was unauthorized. The laying out proceedings are questioned upon various grounds, some jurisdictional, and others relating to the regularity of the procedure. It is claimed among other things that it does not affirmatively appear that the persons who signed the petition for laying out the street, were owners of lands situated thereon. The charter (Title 5, § 4) requires, as the initial proceeding in the laying out of a street, that a petition therefor shall be presented to trustees of the village, signed by one-third of the persons owning land on the line thereof. The petition for laying out Irving avenue did not show on its face that the persons who signed it were such owners. The plaintiff in support of this and other objections to the proceedings, invokes the well-settled doctrine, declared in numerous cases that where lands are

Opinion of the Court, per ANDREWS, J.

taken under statute authority, or an assessment is imposed thereon in derogation of the common law, no intendment is indulged in favor of the regularity of the proceedings, but that each step in the process prescribed by the statute must be shown to have been taken by the party asserting any rights thereunder. (*Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, id. 92.) In other words the *onus* in such case, of showing the regularity of the proceedings, is upon the party claiming under them. The cases cited were actions of ejectment in which the defendants, admitting the original title of the plaintiff, set up a subsequently acquired tax title, as a defense to the action. The doctrine that the *onus* was upon the party claiming under the tax title, to establish its regularity, was appropriately applied in those cases. But the plaintiff in this case by the character of her action, assumed the burden of establishing the invalidity of the proceeding of the trustees. She comes into court asserting as a ground for equitable relief, that an illegal assessment has been imposed on her land, which, if followed by a sale thereof, and a conveyance as was threatened, will constitute a cloud on her title. The trustees of the village, as we have seen, are authorized to lay out and open streets under certain restrictions and conditions. There is no presumption that in undertaking to execute this authority they have acted illegally, or that conditions precedent have not been performed. The plaintiff, instead of awaiting an attack on her title by one claiming under the assessment, becomes herself the actor, and calls upon the court to interpose and prevent the sale of her property, alleging that the trustees never acquired jurisdiction by a proper petition, and that the proceedings are otherwise defective. She has tendered this issue, and according to the general rule the party holding the affirmative of an issue must prove it, or at least go as far as to make a *prima facie* case, calling upon the other party to answer it. (1 Greenl. Ev., § 74; BROWN, J., *Bouton v. City of Brooklyn*, 15 Barb. 375, 395; *In re Ingraham*, 64 N. Y. 310; *Heinemann v. Heard*, 62 id. 448.) The fact that the petitioners were not on the face of the petition alleged to be

owners of land on the proposed street, did not tend to negative the fact. The charter does not require that the fact shall be stated in the petition, or provide in what manner it shall be established. The plaintiff did not prove that the signers were not qualified petitioners, and upon the issue as framed, the burden of establishing it was upon the plaintiff.

The laying out proceedings are also objected to for indefiniteness in the description of the proposed assessment district in the notice given by the trustees of the hearing of the matter of the petition (Charter, tit. 5, § 4), and for various irregularities in the proceedings of the trustees, and of the commissioners of estimate and assessment. These objections, so far as they relate to matters which might have been corrected on appeal from the report of the commissioners, are foreclosed by the final order of confirmation (*Embury v. Conner*, 3 N. Y. 511; *Dolan v. Mayor, etc.*, 62 id. 472), assuming of course, that the parties interested had legal notice of the proceeding. But we deem it unnecessary to consider the objections in detail, for the reason that upon the facts found it is to be inferred that the parties interested in the lands taken for the street, accepted the awards made by the commissioners and acquiesced in the proceedings. This inference is especially strong in respect to the plaintiff's grantor, who owned the lot now belonging to the plaintiff, until 1877. Upon his request the course of the street over his land was changed from the line originally designated, and he paid an assessment for benefit, imposed by the commissioners, and presumptively was awarded, and received compensation for the land taken. The plaintiff is concluded by the acts of her grantor. The street has been open since 1873, and has been used as a public street since 1875, without objection on the part of the owners of the land taken for the improvement. There should, under these circumstances, be very clear proof, that the rights of the land-owners had neither been extinguished nor waived, and that the street had not, by use or otherwise, become a legal highway, to justify the setting aside of an assessment for its improvement on that ground.

Opinion of the Court, per ANDREWS, J.

The objections to the grading proceedings relate to alleged omissions by the trustees to pursue the directions of the statute. But we think none of them are well founded. The fact that the specifications upon which the bids were based, applied to work upon both Haseco and Irving avenues, was immaterial. The two improvements were going on at the same time. It appears that profile maps, showing the amount of rock and earth excavation and filling required on each avenue, were separately made and filed with the specifications, and proposals were invited for the work on each. The bids were to do the work by the foot or yard, and the contract for the work on Irving avenue was let to the person whose proposal was deemed by the trustees to be the most favorable. The charter (Tit. 5, § 23) does not require that the work should be let for a gross sum instead of a price based on quantities. The claim that section 23 requires the trustees to pass upon the bids at the time of opening them, proceeds upon a strained construction of the language of the section. The trustees opened the bids on the twenty-second of September, and, after referring them to the road committee, adjourned till the twenty-fourth, on which day the bid of Weir was accepted. It is evident that some time for comparison and calculation was essential to enable the trustees to ascertain which bid was most favorable. The word "then" in the clause "the trustees shall then determine," etc., reasonably construed has the same sense as "thereafter," and does not restrict the trustees to an instant determination. The objection, that the notice of the meeting of the trustees, to act in respect to the grading, did not describe the limit, or district of assessment with sufficient accuracy, is also, we think, unfounded. The street at that time had been laid out. The map and report of the commissioners had been filed and was of record. The street was known as Irving avenue. The notice referred to Irving avenue, and described the assessment district as including "all the lands on both sides of said street, to a depth not exceeding one hundred feet." This was, we think, a substantial compliance with the charter (§ 23). The

Opinion of the Court, per ANDREWS, J.

claim that the street was graded sixty-six feet wide, instead of sixty feet, the width mentioned in the petition for laying it out, is not well founded in fact. The evidence tends to show that the grading was confined to sixty feet, and that no expense for grading to any greater width, was incurred.

The final class of objections relate to the reassessment in 1879, and we feel constrained to affirm the judgment vacating the assessment, on the ground that there was no legal, valid authority to make a reassessment. The original charter makes no provision for a reassessment for a local improvement, where the first assessment is set aside by the court. The authority of the trustees under the original charter to cause an assessment to be made, was spent on their confirmation of the report of the commissioners of assessment, March 7, 1874. It is not claimed by the learned counsel for the corporation that the trustees could direct a reassessment in the absence of statutory authority. But he claims that such authority was given by section 2, chapter 277, of the Laws of 1878. If that was a valid enactment, the claim is well founded. The act is entitled "An act to amend chapter 245, of the Laws of 1875, entitled 'An act to amend chapter 818, of the Laws of 1868, entitled 'An act to incorporate the village of Port Chester, and to amend chapter 227, of the Laws of 1877.'" The act of 1877, referred to in this title, added certain sections to the charter of the village, and among others a section authorizing a reassessment for the expense of street improvements in the village in certain cases where a prior assessment was set aside or held invalid. It was probably intended to authorize a re-assessment of the expense of grading Haseco and Irving avenues, the assessments for which, had, before the passage of the act, been vacated. But if so intended it failed to accomplish the purpose intended. The language of the act in its natural and grammatical construction only authorized reassessments in cases of assessments which should be set aside, or held illegal, after the passage of the act. The act of 1878 undertook to remedy this difficulty, by amending the act of 1877, so as to authorize a reassessment in cases of assessment set aside or vacated *before* or after the passage of the

Statement of case.

act. But it is insisted that the act of 1878, so far as it assumed to amend the act of 1877, is void as in contravention of section 16, article 3, of the Constitution, because the subject is not expressed in the title. We perceive no answer to this objection. If the act of 1878 had been entitled simply "An act to amend chapter 227 of the Laws of 1877," there could be no question. That an act so entitled is void, has been adjudicated by this court. (*People v. Hills*, 35 N.Y. 449; *People, ex rel. Rochester, v. Briggs*, 50 id. 553.) Such a title, as was said by CHURCH, Ch. J., in the case last cited, would express no subject, but contain a reference only where the subject might be found. The first clause in the title of the act of 1878, referring to the act of 1875 and amending it, is sufficiently definite within the authorities. It shows that the subject of the amended act, and consequently of the amendment, is the charter of Port Chester. But the second clause of the title is not aided by its annexation to the first clause. It is found by reference to the act of 1877, that that act also is an amendment to the charter. But this cannot be known by the title of the act of 1878. The latter clause of the title does not refer to the prior clause, and there is nothing to indicate that the subject-matter of the act of 1877, which it amends, is the charter of Port Chester, or that the two acts referred to in the title have any relation to each other. The title would be as consistent and intelligible if the act of 1877 related to the city of New York, or any other city or village in the State.

This conclusion requires an affirmance of the judgment.

All concur.

Judgment affirmed.

THE CORN EXCHANGE BANK OF CHICAGO, Respondent, v.
ALPHONSO W. BLYE, as Receiver, etc., Appellant.

A receiver of an insolvent national bank acquires no right to property in the custody of the bank, which it does not own, as against the owner,

101	308
142	596
101	308
142	347

Statement of case.

and the provision of the United States Revised Statutes (§ 5242), prohibiting the issuing of an attachment, injunction or execution against such a corporation before final judgment, was not intended to protect the receiver's custody as against such owner.

Accordingly *held*, that said provision did not prohibit the issuing, in an action against the receiver of a national bank to recover possession of personal property, of a requisition directing the sheriff to take into his possession the property in question; that the receiver, if he desired to retain possession of the property during the litigation, could only do so by giving the security required, the same as other defendants in such an action.

(Submitted December 22, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made the first Monday of May, 1885, which reversed an order of Special Term vacating and setting aside a requisition issued herein to the sheriff of Orange county, directing him to take into his possession the property specified in the complaint. (Reported below, 37 Hun, 473.)

This action was brought against plaintiff as receiver of the Middletown National Bank to recover possession of certain securities, which the complaint alleged were pledged to it as security for a draft, which draft was forwarded for collection to said bank, accompanied by the securities with instructions to hold them until payment of the draft. The complaint also alleged that the draft was not paid, that the bank suspended, defendant was appointed receiver of its assets, the securities were delivered over to him, and he refused to deliver up the same on demand.

Elihu Root for appellant. The word "attachment" in section 5242 of the United States Revised Statutes, means not only the peculiar warrant or process which the New York Code, at any particular date, describes as an attachment, but it includes whatever comes within the general signification of the term. (*Raynor v. Pacific Nat. Bk.*, 93 N. Y. 371; *Nat. S. & L. Bk. v. Mech. Nat. Bk.*, 89 id. 467; *Robinson v. Nat. Bk. of Newberne*, 81 id. 385.) The provision of the section inured to the benefit of a receiver just as much as to that of the bank.

Opinion of the Court, per FINCH, J.

(*Rosenblatt v. Johnston*, 104 U. S. 462.) The insolvency of a national bank requires the appointment of a receiver (§ 5234). The receiver so appointed is an officer of the United States. (*Kennedy v. Gibson*, 8 Wall. 498.) If section 5242 were expunged from the statute, the order of Special Term would nevertheless be right, for process can no more run to the sheriff against the receiver *pendente lite* than it can run to the sheriff against the United States marshal. (*Kilmer v. Hobart*, 8 Abb. N. C. 426; *Havens v. City of Brooklyn*, 6 T. & C. 346.) The order is appealable. (*Allen v. Meyer*, 73 N. Y. 1.)

L. A. Gould for respondent. The object of section 5242, United States Revised Statutes, is to prevent one creditor of a corporation whose assets are insufficient to meet its liabilities, from obtaining a preference, whether it is sought through a voluntary assignment or transfer or payment, or the form of a legal proceeding. (*Robinson v. Nat. Bk. of Newberne*, 81 N. Y. 393; *Nat. S. & L. Bk. v. Mech. Nat. Bk.*, 89 id. 467; *Nat. Bk. v. Colby*, 21 Wall. 609; *Raynor v. Pac. Nat. Bk.*, 93 N. Y. 373; *Cragie v. Hadley*, 99 id. 131.)

FINCH, J. The sole question in this case is whether section 5242 of the United States Revised Statutes prohibits the requisition issued to the sheriff and protects the receiver in his possession. The Bank of Middletown became insolvent and the defendant was appointed its receiver under the Federal law. That appointment vested in him all the assets of the bank to be converted into money and distributed among the creditors. The object sought to be accomplished is the distribution of those assets fairly and without preferences, and that has been held to be the aim and purpose of the section in question. (*Robinson v. Bank of Newberne*, 81 N. Y. 385; *Rosenblatt v. Johnston*, 104 U. S. 462.) It specifically prohibits all transfers of the corporate property made with a view to preferences, and so protects the creditors from any voluntary act of the bank which selects out favored individuals for payment. But the bank may be passive, and such individuals gain a preference by a

Opinion of the Court, per FINCH, J.

suit against the corporation preceded or accompanied by an attachment or injunction, or, after judgment, enforced by an execution. These three things, therefore, were specifically prohibited by name; each being process well known and accurately defined in the law; and without any general words to carry the prohibition beyond them. The receiver, by his appointment, acquires no right to property in the custody of the bank which the latter does not own, as against the real owner; and the section in question was plainly not intended to protect the receiver's custody as against such owner. It aims to protect the property of the bank in his hands, and not to give him arbitrary control of what the bank does not own. If the latter should be held, its injustice is well suggested by the General Term in its application to special deposits of customers left merely for safe-keeping. It does not alter the case that there is here a dispute about the title, and the receiver claims to be owner. He might make such claim in any case. No law makes him the inevitable stakeholder pending the litigation. He may become so by giving the needed security, and we can see no just reason why he should be exempted from that obligation which falls upon others. The plaintiff is required to give such security as the condition of his writ, and the receiver need run no risk in the performance of his duty. It is said the word "attachment" is used not in the local sense affixed by State enactments, but in a broader sense; and the definition of Bouvier is cited. But by that definition and in every use of the term it always assumes title in the person against whom the writ issues, and seeks to hold possession of his property, and on the ground and for the reason that it is his. No nomenclature has ever made it the equivalent of a writ of replevin which issues upon a theory exactly the reverse. There is no collision of jurisdictions. The authority of the Federal courts over the assets and the right of its officer to hold them is not questioned or invaded. No property over which those courts have obtained jurisdiction is interfered with. What is sought to be recovered is property over which they have ob-

Statement of case.

tained no jurisdiction, and as to which they have conferred no right upon him.

The order should be affirmed, with costs.

All concur.

Order affirmed.

101	307
194	146
101	807
75 AD	510

In the Matter of the Petition of **PRESCOTT HALL BUTLER**, as
Administrator, Etc.

Except where substantial rights of other parties have accrued and injustice will be done to them by permitting it, a party has a right to discontinue an action or proceeding, and his reasons for so doing are of no concern to the court.

A refusal of leave to discontinue, therefore, where nothing appears to show that it will injuriously affect the rights or interests of the adverse party, is not within the discretion of the court, and is error.

Where an administrator of the estate of a deceased lunatic commenced proceedings by petition in the Court of Common Pleas of the city of New York, to compel the committee of the lunatic to account and to deliver over the property remaining, and thereafter entered an *ex parte* order of discontinuance, the costs to be paid by the administrator, which order after tender of costs, was vacated by the court, and thereupon the administrator moved for leave to discontinue which was denied, the only facts shown being that after the entry of the first order the administrator had commenced an action in the Supreme Court to settle the accounts. *Held*, that there was no just basis for the refusal of leave upon which any discretion was called into exercise or could operate; and that the denial of the motion was error.

(Argued December 22, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Court of Common Pleas in and for the city and county of New York, made November 10, 1884, which affirmed an order of Special Term denying a motion on behalf of Prescott Hall Butler, the petitioner above, for leave to discontinue these proceedings.

The nature of the proceedings and the material facts are stated in the opinion.

Statement of case.

Stephen A. Walker for appellants. A party to an action or special proceeding has a right to an order without notice to his adversary, discontinuing his suit on payment of costs. (Garham's Pr. 603-604; 1 Burr. Pr. 383; *Averill v. Patterson*, 10 N. Y. 500; *Cook v. Beach*, 25 How. 356; 2 Wait's Prac. 600; Tillinghast's Pr. 333; *Seaboard R. R. Co. v. Ward*, 18 Barb. 595; *Harrington v. Libby*, 6 Daly, 259; *Cummings v. Bennett*, 8 Paige, 81.) A plaintiff is not allowed to discontinue in the following cases; when a new action on a counter-claim would be barred by the statute. (*Van Allen v. Schermerhorn*, 14 How. 287; *Rees v. Patton*, 13 id. 258; *Pac. Mail v. Leuling*, 7 Abb. [N. S.] 37); when defendant in a replevin suit has surrendered property to plaintiff; (*Wilson v. Wheeler*, 6 How. 49); when plaintiff has obtained a decree; (*Picabia v. Everard*, 4 How. 113); in an ejectment suit before a second trial, where plaintiff has secured possession of the property by means of the judgment entered upon the first; (*Carlton v. Dorey*, 75 N. Y. 375); when the defendants have been examined as witnesses. (*Cockle v. Underwood*, 3 Duer, 676.) In general, when an action or special proceeding has been commenced, the defendant may have an interest that it shall be conducted to its termination, and in such case the court can protect such interest by refusing to permit the action or proceeding to be discontinued, or it may impose such reasonable terms as a condition of discontinuance as will fully protect or indemnify the defendant. (*Matter, etc., Waverly Water-Works Co.*, 85 N. Y. 482.) This court will review and examine the grounds of an order refusing leave to discontinue if it involves an abuse or excess of discretion in the court below. (*Carlton v. Darcy*, 75 N. Y. 377.)

Henry Thompson for respondent. An application for leave to discontinue an action or special proceeding is addressed to the discretion of the court below; it may be granted upon terms or refused absolutely. (*Salmon v. Gedney*, 75 N. Y. 479, 482; *In re Waverly Water-Works Co.*, 85 id. 478, 481; *Carlton v. Darcy*, 75 id. 375; *Van Allen v. Schermerhorn*, 14

Opinion of the Court, per FINCH, J.

How. 287; *Cockle v. Underwood*, 3 Duer, 676; *Young v. Bush*, 36 How. 240; *Wilder v. Boynton*, 63 Barb. 547; *Clyde v. Rogers*, 87 N. Y. 625; *People, ex rel. Adams, v. Westbrook*, 89 id. 152; *Woodruff v. Imp. Fire Ins. Co.*, 90 id. 521; *Matter of Loew*, id. 666; *Meltzer v. Doll*, 91 id. 365; *Catlin v. Ricketts*, 91 id. 668; *Commonwealth Ins. Co. v. Bowman*, 90 id. 654; *Attorney-General v. N. A. Life Ins. Co.*, 93 id. 387; *Hatch v. Western Union Tel. Co.*, id. 640; *Smith v. Platt*, 96 id. 635.) The denial of appellant's application for leave to discontinue was not an abuse of discretion, but under all the facts and circumstances disclosed in the papers was eminently proper, and should be confirmed by this court upon the merits. (*In re Colah*, 6 Daly, 59; *De Groot v. Jay*, 30 Barb. 483; *Higgins v. Wright*, 43 id. 468; *Angel v. Smith*, 9 Vesey, Jr., 335; Code of Civ. Pro., §§ 263, subd. 8, 267.) The ostensible reasons given for appellant's desire to discontinue are insufficient, while the real reasons are not such as the court will recognize and enforce. (Code of Civ. Pro., §§ 2320, 2341, 2342.)

FINCH, J. Ordinarily, a suitor has a right to discontinue any action or proceeding commenced by him, and his reasons for so doing are of no concern to the court. A party should no more be compelled to continue a litigation than to commence one, except where substantial rights of other parties have accrued, and injustice will be done to them by permitting the discontinuance. In such a case, through the control which the court exercises over the entry of its order, there is discretion to refuse; but where there are no such facts, and nothing appears to show a violation of the right or interest of the adverse party, the plaintiff may discontinue, and a refusal of leave becomes merely arbitrary and without any basis upon which discretion can exist. (*In re Anthony Street*, 20 Wend. 618; *Carleton v. Darcy*, 75 N. Y. 375, 377.)

In this case the defendant was appointed by the Court of Common Pleas, on July 20, 1870, committee of Bomanjee Byramjee Colah, a lunatic, and took possession of his property.

Opinion of the Court, per FINCH, J.

Up to the death of Colah, that court retained exclusive jurisdiction over the committee and the estate in his hands. But the lunatic, whose place of residence was in Bombay, died, while in New York and under the ward of the court, and the appellant was duly appointed ancillary administrator of his estate. As such administrator he commenced, in December, 1882, a proceeding by petition in the Common Pleas to settle the accounts of the committee and obtain the property remaining. This proceeding went so far as the entry of an order of reference, but no further proceedings were ever taken under it. At this point the administrator entered *ex parte* an order of discontinuance on payment of costs, which was vacated by the court, and thereupon, moving for leave to discontinue, his request was refused. We can discover no reason for the refusal upon which discretion could operate. Two only are suggested. It is shown that after the entry of the first order the administrator began an action in the Supreme Court to settle the accounts, and it is said that the latter court had no jurisdiction, and that the control of the Common Pleas survived the death of the lunatic and the termination of the committee's office. (Code of Civ. Pro., § 2320.) That is a question of law. The administrator had a right to raise it and could only do so by bringing his action in another court. By that process it may properly come before us if necessity should require it, but it has no place on a motion to discontinue. If the opinion of the Common Pleas on that question of law furnished a basis for the exercise of discretion the administrator cannot bring the question into this court for decision. It ought not to be decided on a mere motion for leave to discontinue, and should have been left to some suitable occasion. It is further said that the new action "harasses" the defendant unnecessarily. We cannot see how. All costs of the discontinued proceeding are to be paid and have been tendered. The defendant acquired no new rights. He is left precisely in the position he would have been in if the proceeding in the Common Pleas had never been commenced, and the action in the Supreme Court alone had been brought. Would that action have unnecessarily "harassed"

Statement of case.

him? We can see no just basis for the refusal of leave to discontinue upon which any discretion was called into exercise, or could operate.

The orders of the Special and General Terms should be reversed and the motion for leave to discontinue should be granted. No costs are allowed on this appeal.

All concur.

Ordered accordingly.

JAMES VAN ALLEN DAVIS, Respondent, v. AROVESTUS P.
CRANDALL, Appellant.

The will of E., after a bequest to C. of a bond and mortgage executed by James Davis, contained a bequest to J. as follows: "the sum of \$248.92, a portion of the debt due me from the said James Davis, secured by his notes;" then followed a similar gift to the plaintiff; the legatees were infant sons of Davis. At the time of the making of the will and at the time of his death, the testator held a note against said Davis for the amount of the two sums thus bequeathed. *Held*, that the gift to plaintiff was a specific legacy of one-half the note.

Defendant was executor of the will. At the time of the death of the testatrix, plaintiff was about five years old. About four years thereafter he surrendered the note to Davis, taking in lieu thereof two notes, one payable on demand to each of the legatees for his one-half. After settlement of his accounts as executor, defendant tendered plaintiff's note to the mother of the legatees, but she refused to receive it, and requested him to keep it until plaintiff should come of age. He accordingly retained it. Davis was perfectly responsible up to two or three years before plaintiff became of age, when he became insolvent and unable to pay the note. In an action brought by plaintiff after he became of age to recover the amount of the note and interest, *held*, that he was entitled to recover; that as the gift was a specific legacy, and not needed for any purposes of administration, defendant, after the expiration of one year from the granting of letters testamentary, should have delivered the original note to the legatee; that if he could not deliver it to them jointly it was proper to take two notes as he did; that as the plaintiff was a minor and so a delivery could not be made to him, and as a delivery to his mother would not discharge defendant, if he desired to relieve himself from responsibility he should have procured the appointment of a guardian (2 B. S. 151, § 5, as amended by § 44, chap. 460, Laws of 1887), to whom he could have

Statement of case.

delivered the note. Also *held* that, assuming defendant was under no obligation to have a guardian appointed, and after the accounting owed no duty as executor in reference to the note, by retaining possession and control of it he became trustee thereof for plaintiff and should have used efforts to secure or collect it.

No citation for defendant's accounting as executor was served upon plaintiff, who was then about nine years old; it was served upon his mother, who was also a legatee. Upon the return day of the citation an attorney was appointed special guardian for plaintiff. No mention was made in the account of the surrender of the original note, or of the taking of the two in place thereof, nor was any mention of the latter made in the accounting, or the decree. *Held*, that said decree was not final or conclusive as against plaintiff. *First*, Because the surrogate had no jurisdiction to appoint such special guardian, and the decree was not binding upon plaintiff, he not having been served with a citation as required by the statute. (2 R.S. 93, § 61.) *Second*, Because there was no adjudication upon the accounting in respect to the note.

(Argued December 22, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made the second Tuesday of June, 1883, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

John S. Morgan for appellant. The plaintiff, claiming under the will, must take it as he finds it. He cannot in the same breath affirm it and deny it. (*Decker v. Waterman*, 67 Barb. 460, 465.) Whether the gift or bequest in question should be deemed a specific legacy depends upon the intention of the testator. (1 Roper on Legacies, 192.) The test is, would it be liable to ademption. (2 Redf. on Wills, 462.) The intent of the testator is apparent from the fact that all the rest of her property was specifically disposed of. (*Charworth v. Beach*, 4 Ves. 555; *Onondaga Trust, etc., Co. v. Price*, 87 N. Y. 542.) As property specifically bequeathed the executor had no authority to collect or to do any thing with it, except to preserve and pass it to the legatee. (*McClellan on Executors*,

Statement of case.

90; *Spear, Es'r, v. Tinkham*, 2 Barb. Ch. 212; 1 Roper on Legacies, 192; 2 Redf. on Wills, 458; 2 R. S. 87, §§ 25, 26; *Doe v. Guy*, 3 East, 123; *Onondaga Trust, etc., Co. v. Price*, 87 N. Y. 548; *Hudson v. Reeve*, 1 Barb. 89, 93.) In preserving this legacy, tendering it to plaintiff's mother during his minority, and to him, on his attaining his majority, this executor did all he could or was bound to do in the premises. (*Larkin v. Salmon*, 3 Dem. 270, 272; *Platt v. Moore*, 1 id. 191.) The note did not outlaw while in defendant's hands before plaintiff became of age. (Code of Pro., § 101; Code of Civil Pro., § 396.) The only negligence in the case is that of the plaintiff and his parents. (2 R. S. 151, §§ 4, 5, 6. Laws of 1871, chap. 708.)

Stephen K. Williams for respondent. The legacy to the plaintiff is a pecuniary legacy, a demonstrative legacy, and not a specific legacy. (Willard's Eq. Jur. 502, 504, 506, 507; *Doughty v. Stillwell*, 1 Bradf. 300, 303-309; *DeNottebeck v. Astor*, 3 Kern. 98, 105, 106; *Gidding v. Seward*, 16 N. Y. 365; *Bumpus v. Bumpus*, 29 L. T. [N. S.] 800.) It was the duty of the executor to collect the Davis note and pay this legacy. (*Newton v. Stanley*, 28 N. Y. 61, 62, 66.) The defendant should have procured the appointment of a guardian, to whom the legacy could have been paid, under the direction of the surrogate. (2 R. S. 91, §§ 47, 48, 49.) The legacy, whether general or specific, belonged to the executor. It was not the property of the plaintiff, except with the assent of the executor. (Redfield's Law of Surrogate Courts, 318; 2 Perry on Trusts, § 809; Willard's Eq. Jur. 498, 500, 501; 2 Madd. Ch. 1, 2; 2 Wms. on Exrs. 1235, 1237, 1239, 1748, 1207; Dayton on Surr. [2d ed.] 411, 412; 2 R. S. 87, § 26.) An executor is always a trustee and assumes the duties of a trustee. (2 Madd. Ch. 1; Willard's Eq. Jur. 498, 500, 501.) An executor, or other trustee, cannot be protected against loss in investing trust funds, unless he loans on real security, or invests in some fund approved by the court. (*Ackerman v. Emott*, 4

Statement of case.

Barb. 636, 637, 645-8; *Mills v. Hoffman*, 26 Hun, 594, *Barney v. Saunders*, 16 How. [U. S.] 534, 545; *King v. Talbot*, 40 N. Y. 77; *S. C.*, 50 Barb. 453; *Leitch v. Wells*, 48 id. 599; 84 id. 343.) A trustee cannot invest in a promissory note. (*Matter of Foster*, 15 Hun, 387, 389, 393, 394.) In this case the defendant could not be protected against personal liability for loss, by any investment, unless in the manner required by statute "under the direction of the surrogate." (2 R. S. 91, § 48; *Holmes v. Dring*, 2 Cox, 1.) Where an executor omits, or violates, a positive duty and a loss occurs, he becomes personally liable. (*Eckford v. DeKay*, 8 Paige, 89; *Ackerman v. Emott*, 4 Barb. 648; *King v. Talbot*, 50 id. 453.) The executor not only invested in an improper security, but he allowed it to lay until the promissory note in which he had invested had become outlawed, which was a *devastavit* and rendered him personally liable, for the amount of the legacy and interest, to the plaintiff when he became of age. (*Powell v. Evans*, 5 Ves. 839; *Eggleston v. Coventry*, 8 id. 466; *French v. Holson*, 9 id. 103; *Wilkes v. Stewart*, Coop. Ch. 6; *Walton v. Walton*, 1 Keyes, 15.) Being payable on demand, the statute commenced running on the note at its date, and an action thereon against the maker is barred by the statute of limitations if not brought within six years after its date. (*Wheeler v. Warner*, 47 N. Y. 519; *McMullen v. Rafferty*, 24 Hun, 363.) Where an executor neglects to collect debts due the estate he is personally chargeable with their amount (even when infants are not concerned) although there has been no loss of the debts, and no improper motives are imputable to the executor — the mere delay is enough to charge him; as a delay of three years. (*Shultz v. Pulver*, 11 Wend. 363, Ct. of Errors; affirming 3 Paige's Ch. 172; *Harrington v. Keteltas*, 92 N. Y. 40; Dayton on Surr. [2d ed.] 480, 481, 482, 519; 65 Barb. 77; *Shultz v. Pulver*, 11 Wend. 364, 365.) It is no exoneration that the executor was not influenced by any impure motives, or that the executor has acted in good faith and intended fully and fairly to discharge his duty. (*Caffrey v. Dailey*, 6 Ves. 487;

Statement of case.

Wms. on Exrs. 1536-1538; Dayt. Surr. [2d ed.] 480, 48; *Cornwall v. Dick*, 3 N. Y. Weekly Dig. 85; *S. C.*, 8 Hun, 122; *Baskin v. Baskin*, 4 Lans. 93, 94; *Litchfield v. White*, 3 Seld. 438; *Hollister v. Burritt*, 14 Hun, 291.) Executors and trustees are not warranted in lending money of the estate on mere personal security, such as the bond or promissory note of the borrower. (Hill on Trustees, 370, 378, marg. page; *Bogart v. Van Velsor*, 4 Edw. Ch. 718; Dayt. Surr. [2d ed.] 482; *Lawson v. Copeland*, 2 Bro. Ch., chap. 130; 2 Story's Eq. Jur., § 1274; 2 R. S. 91, marg. page, § 48; *Barry v. Saunders*, 16 How. [U. S.] 535, 543; *King v. King*, 3 Johns. Ch. 552; *Cross v. Smith*, 7 East, 246.) Administration of assets implies such a complete disposition of them as not only to collect them from the debtor of the estate if they are in that condition, but finally to place them in the hands of the creditor, legatee, or distributee, to whom, after undergoing the process of administration, they finally belong. (*Walton v. Walton*, 1 Keyes, 17; *McClosky v. Reid*, 4 Bradf. 339; *Bevan v. Cooper*, 7 Hun, 117, 119.) If this was a specific legacy, it was improperly withheld and retained by the executor for such length of time as to make him trustee for the infant, and responsible for the care and investment of the same, to the same extent as any trustee. (*Fisher v. Fisher*, 1 Bradf. 335; 1 Madd. Ch. 91; *Cromwell v. Kirk*, 1 Dem. [N. Y. Surr. Ct.] 599; *Van Epps v. Van Deusen*, 4 Paige, 64, 71, 74; *Isenhardt v. Brown*, 2 Edw. Ch. 341, 343.) The executor having rendered an account and verified it with his oath, that he has collected this note of James Davis, he ought to be bound and estopped by this account and the decree to that effect, and ought not to be permitted to contradict it. (*McMarsh v. Pres.*, etc., 55 N. Y. 222; 26 Barb. 346, 354; McClellan's Surr. 308, 309.) Defendant could not proceed to transfer this note to the plaintiff or bearer. He could not transfer the note except by order of the surrogate, and then only to a general guardian, or to the surrogate himself. (*Wilcox v. Smith*, 26 Barb. 318, 336; 2 R. S. 91, § 47; id. 96, § 82; *Stephens v. Van Buren*, 1 Paige, 479; *McCabe v. Fowler*, 84 N. Y. 318; *Harrington*

Statement of case.

v. *Keteltas*, 92 id. 40; 14 Hun, 291, 293.) Defendant's possession of the note was sufficient to enable him to collect it, and payment to him would have been good. (*Crandall v. Schroepfel*, 1 Hun, 557; *Scoville v. Landon*, 50 N. Y. 686; *Merritt v. Cole*, 9 Hun, 98; 4 Edw. Ch. 718; 1 Paige, 479.) The trial court erroneously admitted evidence of directions of the plaintiff's mother to the defendant, to keep the note until the minor became of age. (*Combs v. Jackson*, 2 Wend. 153; *Hyde v. Stone*, 7 id. 356; *Jackson v. Combs*, 7 Cow. 37; *Whitlock v. Whitlock*, 1 Dem. [Surr. Ct.] 160; *Mills v. Hoffman*, 26 Hun, 600; 2 Wms. on Exrs. 1259, 1267, and note, 1268; 2 Perry on Trusts, §§ 612, 624; Hill on Trustees, 398; *Genet v. Tallmadge*, 1 Johns. Ch. 3; *Morrell v. Dickey*, id. 156; *Houghton v. Watson*, 1 Dem. [Surr. Ct.] 299; *People v. Supervisors*, 70 N. Y. 228; *Krekeler v. Thaule*, 73 id. 608; *Godfrey v. Mosher*, 66 id. 250; *Mackay v. Lewis*, 73 id. 382.) The accounting in the Surrogate's Court was of no binding force against the plaintiff. The decree and all proceedings, and the orders made therein, were absolutely void as to plaintiff, who had no notice. (*President, etc., v. Hasbrouck*, 6 N. Y. 221; *Hood v. Hood*, 19 Hun, 300, 302; *Whitlock v. Whitlock*, 1 Dem. [Surr. Ct.] 160; *Hellet v. Rathbone*, 4 Paige, 102, 106; Laws 1863, chap. 362, § 1; 2 R. S. 93, § 61; *Bellamy v. Guhl*, 62 How. Pr. 460; *Ingersol v. Mangum*, 84 N. Y. 622; Dayton's Surrogate [2d ed.], 469, 470; 2 R. S. 94, § 65; *Story v. Dayton*, 22 Hun, 450; *Matter of Fritz*, 2 Paige, 374, 304; 1st General Rule, p. 49; *Pinckney v. Smith*, 26 Hun, 524; 2 R. S. 92, § 54; Dayton's Surrogate [2d ed.], 459, 460, 482; *Wilcox v. Smith*, 26 Barb. 319, 341-2; *Metzger v. Metzger*, 1 Bradf. 265; 2 R. S. 92, § 55; 6 Paige, 167.) The legacy being a demonstrative legacy, it would not be adeemed, or the plaintiff's right of action destroyed by the loss to the estate of one of the renewed notes against James Davis taken for half of the original note against him. (Dayton's Surrogate [2d ed.], 400; *Doughty v. Stillwell*, 1 Bradf. 300; *Clayton v. Wardwell*, 2 id. 1, 7.) The legacy to the

Opinion of the Court, per EARL, J.

appellant was a pecuniary legacy. (*Doe v. Shelton*, 3 Ad. & El. 265, 283; 1 Greenl. Ev., § 23, note 3; Bouv. L. Dic., tit. Legacy; *Roberts v. Pocock*, 4 Ves. 150; *Kirby v. Porter*, id. 748; *Dean v. Zest*, 9 id. 146; *Wilson v. Brownsmith*, id. 180; *Pawlet's Case*, Ld. Raym. 335; *Peterborough v. Mortlock*, 1 Bro. Ch. 565; *Enders v. Enders*, 2 Barb. 366, 367.) It was the executor's duty to discharge the legacy at the expiration of one year from the granting of letters testamentary. (*Walton v. Walton*, 1 Keyes, 17; *McClosky v. Reed*, 4 Bradf. 339; *Bevan v. Cooper*, 1 Hun, 117, 119.) Any person who takes possession of an infant's property takes it in trust for the infant (whether the property be a legacy, or held in the infant's own right, and will be held to the same degree of responsibility as if he had been formally appointed to the office of guardian, and is accountable to the like extent. (*Fisher v. Fisher*, 1 Bradf. 335; 1 Madd. Ch. 91; *Cromwell v. Kirk*, 1 Dem. 599; *Van Epps v. Van Deusen*, 4 Paige, 64, 71, 74; *Mason v. Roosevelt*, 5 Johns. Ch. 542.) The taking of the note payable to the infant or bearer, without any delivery to him, or promise to him personally, did not prevent the note outlawing in six years. (*Darnall v. Adams*, 13 B. Monr. 273; *Brady v. Walters*, 55 Ga. 25; *Williams v. Otey*, 8 Humph. 563; *Bennett v. Williamson*, 8 Ired. 121.)

EARL, J. In October, 1861, Elbertia Van Allen made her will in which she gave to Christina Amelia Davis a certain bond and mortgage made and executed by her husband, James Davis; to Helen Stephenson, a certain bond and mortgage executed by John Stephenson; to J. Elbert Davis "the sum of \$243.92, a portion of the debt due me from the said James Davis secured by his notes;" to James Van Allen Davis "the sum of \$243.92, another portion of the debt due me from the said James Davis and secured by his notes." At the time of making the will the testatrix held a single note against James Davis for the amount of the two sums thus bequeathed. Thereafter, in 1863, she died, leaving the note among her assets unpaid. The defendant was named executor in her will and took upon him-

Opinion of the Court, per EARL, J.

self the execution thereof. James Van Allen Davis, the plaintiff, and J. Elbert Davis were minor sons of the maker of the note, and at the time of the death of the testatrix the plaintiff was about five years old. About four years after her death, the defendant surrendered to James Davis the note left by her, and took in lieu thereof, from him, a note for one-half the amount thereof, payable to the plaintiff or bearer on demand, with interest, and for the other half thereof, a note payable to J. Elbert Davis on demand with interest. A few days after taking these notes, he applied to the surrogate of Wayne county for a settlement of his accounts, and in his petition, among other things, stated that the plaintiff, one of the legatees named in the will, was an infant under the age of twenty-one years, having no guardian. No citation for the accounting was served upon the plaintiff who was then about nine years old, but it was served upon his mother who, as a legatee, was also interested in the accounting. Upon the return day of the citation, an attorney was appointed his special guardian for the accounting, and the defendant presented his account to the surrogate, in which he charged himself with having received May 5, 1865, upon the note of James Davis, two items of \$203.87 each, and under the same date he credited himself with having paid to J. Elbert Davis and to the plaintiff each the sum of \$203.87. No mention was made in the account of the surrender of the note of James Davis left by the testatrix, or of the taking of the two notes in the place of it; nor was any mention made in the account, or in the decree of the surrogate thereon, of the two notes, and there was no adjudication in reference to such notes. Upon the accounting, no action whatever was had in reference to the note which had been taken for the plaintiff. Thereafter the defendant tendered the note to the plaintiff's mother, but she refused to receive it, and requested him to keep it until the plaintiff should come of age, and the defendant thereafter retained the note in his possession until after the plaintiff became of age and commenced this action. During many years after the defendant took the note from Davis, he was perfectly responsible and the note could have been collected. But two or three years before the plaintiff arrived at his majority, Davis became wholly

Opinion of the Court, per EARL, J.

irresponsible and insolvent and unable to pay the note. The plaintiff, having become of age, brought this action against the defendant to recover of him the amount of the note with interest thereon.

At the Special Term it was held that the decree of the surrogate was final and conclusive against the plaintiff and protected the defendant against any claim in this action. Upon appeal by the plaintiff to the General Term, the judgment of the Special Term was reversed, and then the defendant appealed to this court.

We are of opinion that the legacy of the plaintiff was a specific legacy of one-half of the note which the testatrix held against his father. Whether a legacy shall be considered specific depends upon the intention of the testator or testatrix, to be derived from the language used in the bequest, construed in the light thrown upon it by all the other provisions of the will. Here there were specific bequests of the two bonds and mortgages to Mrs. Davis and to Mrs. Stephenson, and it is entirely clear that the precise bonds and mortgages named were to go to the legatees. So in the bequests immediately following to the plaintiff and to J. Elbert Davis, it was clearly the intention that the one-half of the note held by the testatrix should go to each of the legatees named. If that note had been paid during the life-time of the testatrix or otherwise canceled or destroyed, so that no obligation at her death rested upon James Davis to pay it, the two legatees would have taken nothing.

As this was a specific legacy and not needed for the payment of debts or any other purpose of administration, it was the duty of the defendant, after the expiration of one year from the granting of letters testamentary, to discharge it by delivery to the legatee. If the two legatees of this note had been adults, the executor would have discharged his duty by delivering it to them jointly, if they were willing to take it in that way. If they had refused to take it, or for any reason could not take it in that way, it would undoubtedly have been proper for him to do as he did — divide the note by taking two notes each for one-half — payable to each of the legatees upon demand, with

Opinion of the Court, per EARL, J.

interest. In this case the defendant so far discharged his duty by taking the two notes, and that act imposed no new or additional obligation upon him.

As the plaintiff was a minor, the defendant could not discharge himself by delivering the note to him, nor by delivering it to his mother, Mrs. Davis. She was not his legal, nor while his father lived, his natural guardian. A delivery to her would not have been an effectual delivery to the plaintiff so as to discharge the defendant.

As the plaintiff was a minor, the note should have been delivered to his guardian. It furnishes the defendant no defense that the plaintiff did not have a guardian at the time, for it was in his power to procure the appointment of one, as it is provided by section 5 of title 3, chapter 8, part 2 of the Revised Statutes, as amended by section 44 of chapter 460 of the Laws of 1837, that if a minor be under the age of fourteen years, the application for the appointment of a guardian may be made by any relative or other person in his behalf. Therefore, in this case, if the defendant desired to discharge himself from responsibility as to this specific legacy, he should have procured the appointment of a guardian, and then have delivered the note to such guardian. He could not hold the note for more than fifteen years, until the maker thereof became wholly insolvent and the note wholly worthless, and escape liability by then tendering the note to the legatee. It does not avail the defendant to say that the relatives of the plaintiff could have procured the appointment of a guardian. They had no duty to discharge which required the appointment of a guardian. But if the defendant desired to be relieved of responsibility in reference to the note, the duty rested upon him to make a valid delivery thereof to the legatee, and for that purpose it was incumbent upon him to have a guardian appointed.

But if we should assume that the defendant was under no obligation to have a guardian appointed for the plaintiff, and that after the accounting, he owed him no duty as executor in reference to the note, the same result would still follow. He took and retained possession and control of the note, and, upon the assumption made, thus became trustee thereof for the

Opinion of the Court, per EARL, J.

plaintiff, charged with substantially the same duty in reference thereto as would have devolved upon him if he had been formally constituted trustee. Having the possession and control of the property of an infant who is supposed in law incapable of taking care of his own property and looking after his own interests, he was bound to exercise some care and diligence in preserving and protecting the same; and he could not carelessly permit the same to be destroyed or become worthless without incurring liability. He should have used efforts to secure the note, or to collect it either in his own name or that of the infant. (*Cromwell v. Kirk*, 1 Dem. 599; *Van-Epps v. Van Deusen*, 4 Paige, 64; *Mason v. Roosevelt*, 5 Johns. Ch. 534.)

The decree of the surrogate upon the final accounting furnishes the defendant no defense, because it was not binding upon the plaintiff. He was not served with a citation for the final accounting as required by the statute. (2 R. S. 93, § 61; *Kellett v. Rathbun*, 4 Paige, 102.) Therefore as there was no service of a citation upon him, the court had no jurisdiction to appoint a special guardian for him, and the appointment of such guardian and his appearance did not give the court jurisdiction of him, and for this reason that accounting and the decree made thereon do not bind the plaintiff. (*Ingersoll v. Mangam*, 84 N. Y. 622.) But farther, upon that accounting there was no adjudication whatever in reference to this note or the specific legacy. The note representing the plaintiff's specific legacy was then held by the defendant. He did not claim that he had delivered it to the plaintiff, and had thus discharged the legacy, and no reference whatever was made to it in the account or in the decree; and hence as there was no adjudication about it, the accounting furnishes the defendant no defense.

We are, therefore, of opinion that the order of the General Term is right and should be affirmed, and judgment absolute should be ordered against the defendant, with costs.

All concur.

Order affirmed and judgment accordingly.

SICKELS — VOL. LVI.

41

THE PEOPLE, ex rel. THE NEW YORK AND HARLEM RAILROAD COMPANY, Respondent, v. THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW YORK, Appellant.

An order, reversing on *certiorari* the proceedings of the commissioners of taxes and assessments in the city of New York, in the assessment of property, is final and so reviewable here, although by the terms of the order the matter is remanded to the commissioners for farther proceedings, as they have no authority to proceed under the order.

In re Moore (67 N. Y. 555), and *In re N. Y. & H. R. R. Co.* (98 id. 12), distinguished.

The "tunnels, tracks, substructures, superstructures, stations, viaducts and masonry" of the N. Y. & H. R. R. Co., situate on and under Fourth avenue in the city of New York are "land" within the meaning of that word as used in the statute in reference to property liable to taxation (1 R. S. 387, § 2), and are assessable as such.

The fact that certain of the structures were built for the purpose of furnishing to the public safe and convenient crossings over the railroad tracks, in compliance with the requirements of the act of 1872 (Chap. 702), and that under said act the city is required to pay a portion of the expense of the construction, does not divest the structures of the incidents attached to the other property belonging to the railroad company, or give the city any title thereto.

As regards taxation it is immaterial whether a railroad is laid upon the surface, placed on pillars, or carried through a covered way or tunnel, the structures adopted to sustain it, or facilitate and protect its use, are, within the meaning of the law, land, and for them the railroad company is liable to be taxed.

People, ex rel. N. Y. & H. R. R. Co., v. Com'rs of Taxes, etc. (23 Hun, 687), reversed.

(Argued December 23, 1885; decided January 19, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 4, 1881, which reversed an order affirming on *certiorari* the proceedings of the commissioners of taxes and assessments of the city of New York, in assessing as real estate, for the purposes of taxation, certain structures which are described in the opinion. (Reported below, 23 Hun, 687.)

The facts so far as material are set forth in the opinion.

The commissioners of taxes and assessments in the city of New York, assessed as real estate: "The tunnels, tracks sub-

Statement of case.

structures, superstructures, stations, viaducts and masonry of the New York and Harlem railroad, which are situated on and under Fourth avenue, between Eighty-sixth street and the Harlem river, in the twelfth ward of the city of New York, in the sum of \$1,500,000; and also as real estate, the tunnel, track, substructures, superstructures and masonry of the said New York and Harlem railroad, which are situated on and under Fourth avenue, between Forty-fifth street and Eighty-sixth street, in the nineteenth ward, in the further sum of \$1,500,000, and entered the same in the books called the 'Annual Record of Assessed Valuations of Real and Personal Estate,' as follows:

RAILROADS.	NINETEENTH WARD, 1879.	Ward No	Value of Real Estate.	Corrected Amount.
Owner or Occupant.	Description of Prop- erty.			
New York and Har- lem Railroad Co...	Tunnel, tracks, super- structure, road-bed and masonry, on and under Fourth avenue, between Forty-fifth and Eighty-sixth street.	102	\$1,500,000	"

In due time the relator applied to the commissioners to have the assessed value corrected, but were denied. A review of the proceedings was had upon *certiorari*, issued out of the Supreme Court, when at Special Term they were affirmed and the writ dismissed. On appeal to the General Term, the order of the Special Term was reversed, as was also the proceedings of the commissioners, and they were remanded for further proceedings. From this decision an appeal is taken to this court

D. J. Dean for appellant. The structure was properly assessed as real estate. (1 R. S. [5th ed.] 905, §§ 1, 8.) The structure is a fixture, even according to the common-law definition. And as such would, independently of the statute, be taxable as "land," or "real estate." (*Walker v. Sherman*, 20

Statement of case.

Wend. 636; *Laflin v. Griffiths*, 35 Barb. 58; *Potter v. Cromwell*, 40 N. Y. 287; *McRae v. Central Bk.*, 66 id. 489; *Tabor v. Robinson*, 36 Barb. 483; *Main v. Schwartzwalder*, 4 E. D. Smith, 273; *Goodrich v. Jones*, 2 Hill, 142; *Bishop v. Bishop*, 11 N. Y. 123; *Snedeker v. Wareing*, 12 id. 170.) This structure is to be considered as land or real estate, for purposes of taxation, under the provisions of the statute. (*R. R. Co. v. Cassidy*, 46 N. Y. 46; *People v. Beardsley*, 52 Barb. 105; *Smith v. Mayor, etc.*, 68 id. 552; *People, ex rel. Smith, v. Commissioners of Taxes*, 10 Hun, 207; *Hudson R. Bridge Co. v. Patterson*, 74 N. Y. 365; *People, ex rel. N. Y. Elevated R. R. Co., v. Commissioners*, 82 id. 460.) It is not necessary that the fee of the land, over or beneath which the railroad was constructed, should be in the person or corporation assessed. (*People, ex rel. R. R. Co., v. Cassidy*, 46 N. Y. 46; *Hudson R. Bridge Co. v. Patterson*, 74 id. 365; *People, ex rel. N. Y. Elevated R. R. Co., v. Commissioners, etc.*, 82 id. 460; Laws of 1872, chap. 702, §§ 7, 9, 10; 4 Kent's Com. 536; *Jennings v. Conboy*, 73 N. Y. 230; *Parker v. Plummer*, Cro. Eliz. 190; *Kerry v. Derrick*, Cro. Jac. 104; *Stewart v. Garnet*, 3 Sim. 398; *Craig v. Craig*, 3 Barb. Ch. 76.) It is not necessary that the land through which the tracks and structures are constructed should be subject to taxation. (*People, ex rel. N. Y. Elevated R. R. Co., v. Commissioners of Taxes*, 82 N. Y. 460; *People v. Cassidy*, 46 id. 46; *People v. Beardsley*, 52 Barb. 105; *Smith v. Mayor, etc.*, 68 N. Y. 555; *Hudson R. Bridge Co. v. Patterson*, 74 id. 365.) In assessing the value of the relator's real estate, the respondent was not restricted to its cost, nor was it bound in that regard by the representations made in behalf of the relator. (*People, ex rel. Buffalo & State Line R. R. Co., v. Barker*, 48 N. Y. 71.)

Henry H. Anderson for respondent. Neither Fourth avenue, nor the work which was done under the act of 1872, called the Fourth avenue improvement, is liable to be assessed or taxed as property of the city. (*People v. Kerr*, 27 N. Y. 188, 197, 198; *Worcester Co. v. Worcester*, 116 Mass. 193; *Trustees of*

Opinion of the Court, per DANFORTH, J.

Public Schools v. Trenton, 30 N. J. [3 Stew.] 667; Cooley on Tax. 131; *Plumstead Board v. British Land Co.*, L. R., 10 Q. B. 203; *People v. Salomon*, 51 Ill. 52.) It cannot be assessed or taxed as the property of the railroad company. It is in no sense the property of the company taken as a whole. (1 R. S. 415 [Edm. ed. 375], § 6, subd. 2.) The only right the relators have in these tunnels, viaduct, substructure and masonry is the franchise of running through or over them. But this gave and gives the company ownership neither in the tunnels, nor in any other part of the improvement, and without *ownership*, the liability to assessment for taxation cannot exist. (*Smith v. Mayor, etc.*, 68 N. Y. 552; *Hudson R. Bridge Co. v. Patterson*, 74 id. 365.) The legislature cannot be supposed to have intended to authorize the assessment of a tax which cannot be collected, or to which legislation for the collection of taxes cannot practically be applied. (Laws of 1843, chap. 321; 1 Laws of 1871, chap. 381, p. 740.)

DANFORTH, J. We think the order appealable. Although by its terms the matter is remanded to the tax commissioners, we are referred to no statute under which they can proceed further. Both parties agree that the proceeding is a special one, and we find no aspect in which the order can be regarded as other than a final one. In this respect it differs from the *Moore Case* (67 N. Y. 555), where a rehearing was ordered before the Special Term, and *Matter of the Harlem Railroad* (98 N. Y. 12), where the appeal was dismissed, because for aught that appeared, the order was made in the exercise of discretionary power conferred by statute, and from the other cases cited by the respondent for one or the other of these reasons.

Upon the merits the appeal is well taken. That the things in question form an essential and necessary part of the relator's railroad, as now constructed within the city of New York, cannot be doubted; that of themselves they constitute land within the definition of that term, given in the statute relating to property liable to taxation (1 R. S., tit. 1, chap. 13, art. 1, § 2), is equally clear (*People, ex rel. Elevated*

R. R. Co., v. Comrs. of Taxes, 82 N. Y. 459), and if so, they are liable to assessment to whomsoever has that interest in the real estate which will protect the erection or affixing thereon of these structures, and their possession. (*Smith v. Mayor, etc.*, 68 N. Y. 552.) As to the tracks, rails, sleepers, switches and sidings forming the superstructure upon which the relator's cars run, it is necessarily conceded that, under the law as interpreted in this State, they are to be regarded as real estate belonging to the corporation, and assessable as such, but as to the other subjects which have been treated by the commissioners as equally liable, the contention of the learned counsel for the relator is, that they form part of a public work, erected for the accommodation of the public as part of the improvement known as the Fourth avenue improvement, and belong, not to the railroad company, but to the city, and in its support is cited the statute entitled "An act to improve and regulate the use of the Fourth avenue in the city of New York." (Laws of 1872, chap. 702.)

We find in none of its provisions warrant for such exemption, nor any intention on the part of the legislature to release the defendant from any obligation or liability previously existing, or to which it was bound by the general law. A corporation can construct or operate a railroad only for public use; it cannot exercise its necessarily great powers, except in furtherance of the objects of its incorporation. It may without special permission, and in carrying out its own plans, cross a railroad or highway, not only upon a level, but by means of bridges, viaducts, culverts, under or over passages, and in one way more than another conduct its operations with greater concern for the public safety, but it has never yet been held that the bridge or tunnel by which this safety was promoted did not partake of the incidents of its other property. It may go through a cutting, or upon an embankment, and in either case by walls provide against danger from the slipping of the earth. The whole line might be executed in tunnel, but one as much as the other would be, within the meaning of the law, land, and each equally in possession of the company. Now when we

look at the statute (1872, *supra*) upon which reliance is placed for a different rule, we find authority conferred upon the relator, under certain conditions, to regulate the grade of its railroad in the Fourth avenue, and to construct viaducts, foot and road bridges over any such excavations and tunnels under it, as will make the same safe and convenient to persons crossing, and railroad trains and passengers traveling thereon; at certain streets it prescribes crossings, stone arches and iron bridges, some for foot passengers, others for foot passengers and carriages, and in those places, iron railings or brick walls outside the railroad tracks, to prevent crossing at a level; and where there is an open cut, retaining walls; and when all is done, the same law declares that the "tunnel and railways shall be exclusively for the uses and purposes of said railroad company," and it is made unlawful for any person other than a public officer, in the execution of his duty as such, "to enter or pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of this corporation provided for that purpose." The premises, therefore, upon which these various structures are placed are in the exclusive use of the relator, and they are for the accommodation of the public in no other sense than is the railroad itself for public use. The act of the legislature permitted that appropriation, and its effect is not impaired because the city of New York is compelled by the same act to pay a portion of the expense of construction. The power to make the improvement was conferred solely upon the relator. The city was forbidden to obstruct either the improvement, or the use of the Fourth avenue above Forty-second street for that purpose. Thus it neither controlled the improvement, nor can it be said in any sense to possess it. On the other hand the relators not only controlled the improvement, but when completed could not only use it themselves, but by lease or otherwise, and on their own terms, permit the trains of other railroads to move over it. The principles applied in the *Elevated Road Case* (82 N. Y. 459), and in the cases there cited, apply here. It can make no difference in respect to taxation, whether the rail is laid upon the surface of the

Statement of case.

road, or placed on pillars, or carried through a covered way or tunnel. In either case the structures adopted to sustain it, or facilitate and protect its use, are, within the meaning of the law, land, and for them, as described by the commissioners, the relators were liable to be taxed.

There was, therefore, no error on the part of the commissioners, and it follows that the order of the General Term should be reversed, and the order of the Special Term affirmed.

All concur, except RAPALLO, J., not voting.

Ordered accordingly.

101	828
109	429
101	828
117	459

EMELINE BOGARDUS, Appellant, v. NEW YORK LIFE INSURANCE Co., Respondent.

101	828
148	562

It is essential to the legal statement in a complaint of a cause of action *ex contractu*, that it should allege an existing contract and the performance by plaintiff of such conditions precedent as are thereby provided, or a tender of performance or some adequate excuse for non-performance. Such an excuse exists only when the defendant has prevented performance by plaintiff, or has himself wholly refused to perform, or has wholly disabled himself from completing a substantial performance.

The failure of the defendant to perform some of the obligations of the contract which go to a part only of the consideration, when the breach may be paid for in damages, is not sufficient.

The defendant, by demurring to the complaint in such an action, does not thereby admit the construction put upon the contract by the complaint, or the correctness of the inferences drawn from the facts admitted; he only admits the facts properly stated; and where the contract is set forth, the rights of the parties must be determined by its terms as construed by the court.

A mere representation made during the pendency of negotiations for a contract is not actionable, even if untrue; it must appear to have been material and made under such circumstances as to show that it was intended as a warranty of the fact represented, and so constituting a contract. A mere allegation in a complaint, therefore, of a representation is not equivalent to an averment of warranty or contract.

This action was upon a policy of life insurance, issued by defendant November, 1871, on the Tontine or "ten-year dividend system." A copy of the policy was annexed to and formed part of the complaint. By it the speci-

101	828
168	155
101	828
164	220

Statement of case.

fied annual premium was to be paid each year for ten years, and in case of default in any payment the policy was declared null and void and all payments forfeited. It was also declared therein that no dividend should be allowed unless the insured should survive the ten-year dividend period and unless the policy should then be in force. Aside from the provision for payment of the amount of the insurance upon the death of the insured, the policy provided, in case he survived the ten-year period and the policy was then in force, for a payment in cash or annuity bonds of a proportionate share of dividends, accretions, etc., from a fund to be created by certain contributions furnished by a class of policy-holders, consisting of those effecting insurance on the same plan during the year 1871; also, that the surplus and profits derivable from certain described funds belonging to that class should be equitably apportioned among the surviving policy-holders belonging to the class. In the application for the insurance, the insured consented that defendant might place all dividends accruing on her policy in the reserve fund. The complaint alleged payment of premiums up to November, 1879. This action was commenced in January, 1881. The complaint averred that by the policy defendant bound itself to "receive and keep separate all the premiums paid upon policies of the same class," and all the incomes, profits, etc., accruing therefrom; and alleged as a breach of the contract that defendant had neglected to keep and invest said funds separately. No tender of premiums after November, 1879, or other excuse for non-payment, save the alleged breach on the part of the defendant, was set up, nor was it averred that defendant was insolvent or unable to respond in damages for any breach of contract on its part. On demurrer to the complaint, *held*, that the complaint substantially admitted a non-payment of premiums, and so a breach on the part of the plaintiff of a condition precedent; that the policy did not require a separate investment of the funds belonging to the class which included the policy in suit; and that the consent of the assured to the placing of dividends in a reserve fund did not extend its obligations in this respect; that the averments in the complaint as to defendant's obligations, being simply inferences drawn from the contract itself, were not admitted by the demurrer; but that, assuming the failure to keep the funds separate was a breach of the contract on the part of defendant, it was a breach of an independent agreement for which it could respond in damages, and was not an excuse for non-payment of the premiums; and that, therefore, the complaint failed to show a cause of action.

The complaint contained two counts, the first based upon alleged false and fraudulent representations. The averments were in substance that for the purpose of inducing plaintiff to take out a policy on the Tontine plan, defendant represented that it had received and kept separate, and would continue to do so, the funds belonging to the same class as plaintiff's policy, which representations were relied upon by plaintiff, and

Statement of case.

were false and fraudulent. In the second count, which was for an alleged breach of the contract, it is stated that plaintiff "repeats and reiterates all the allegations hereinbefore contained and makes them a part of her second cause of action." *Held*, that, assuming the averments as to the representations in the first count were incorporated in the second (as to which *quære*), as they were made concurrently with the issuing of the policy, and were necessarily incident to and dependent upon it, the non-performance by plaintiff of the condition precedent, *i. e.*, regular payment of annual premiums, furnished the same defense to an action based thereon; also, that the averments in the first count did not show any cause of action resting in contract, as there was no averment that the representations were a warranty, or were made under such circumstances and in such form as to constitute a contract.

(Argued December 23, 1885; decided January 19, 1886.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made June 25, 1883, which affirmed a judgment in favor of defendant, entered upon an order sustaining a demurrer to the second count of plaintiff's complaint herein.

The substance of the complaint is set forth in the opinion.

B. F. Tracy, Wm. Wirt Hewitt and Lucius McAdam for appellant. The complaint should be liberally construed. (Code of Civ. Pro., § 519; *Prouty v. Whipple*, 10 Week. Dig. 387.) If the facts set forth therein present any cause of action, entitling the plaintiff to *any* relief, legal or equitable, a demurrer thereto for insufficiency must be overruled. (*Marie v. Garrison*, 83 N. Y. 23; *Price v. Brown*, 10 Abb. N. C. 67; *Butterworth v. O'Brien*, 39 Barb. 192; *Conaughty v. Nichols*, 42 N. Y. 86; *Wright v. Hooker*, 10 id. 59; *Mackey v. Auer*, 8 Hun, 183.) Defendant's agreement imports "an obligation" upon "the defendant arising out of a confidence reposed" in it "to apply" the reserve fund "faithfully and according to confidence." Such an agreement constitutes a trust. (*Martin v. Funk*, 75 N. Y. 141; *Day v. Roth*, 18 id. 453; *Barry v. Lambert*, 98 id. 306; *Fisher v. Fields*, 10 Johns. 505; *Watt v. Shipman*, 21 Hun, 598, 606; *People v. City Bk. of Rochester*, 96 N. Y. 32; *Matter of Le Blanc*, 14 Hun, 8; *Lowerre v. Am. Fire*

Statement of case.

Ins. Co., 6 Paige's Ch. 482; *Libby v. Hopkins*, 103 U. S. 309; 2 Story's Eq., § 964.) It was entirely competent for the parties to make the contract contained in the policy and at the same time to leave the meaning of certain words and expressions thereof uncertain, and to leave the explanation of such meaning, and the plan of the system under which the policy was issued to be settled by extrinsic evidence. (*Hope v. Balen*, 58 N. Y. 380; *Hineman v. Rosenback*, 39 id. 98; *Whitford v. Laidler*, 94 id. 148; *Chapin v. Dobson*, 78 id. 74; *Potter v. Hopkins*, 25 Wend. 417; *Beach v. Raritan & D. R. R. Co.*, 37 N. Y. 465; *Briggs v. Hilton*, 99 id. 526; *Eighmie v. Taylor*, 98 id. 288.) The general rule which forbids parol evidence varying the terms of a written contract has no application to collateral undertakings. (*Eighmie v. Taylor*, 98 N. Y. 288; *Chapin v. Dobson*, 78 id. 74; *Johnson v. Oppenheimer*, 55 id. 293; *Van Brunt v. Day*, 81 id. 251; *Julliard v. Chaffee*, 92 id. 529; *Hope v. Balen*, 58 id. 380.) A failure on the part of plaintiff to pay or tender payment of the premiums did not preclude her from recovering damages for the defendant's admitted breaches. (*People v. Empire Mutual L. Ins. Co.*, 92 N. Y. 109; *Shaw v. Republic L. Ins. Co.*, 69 id. 293; *Atty.-Gen. v. Guardian L. Ins. and Ann. Co.*, 78 id. 125.) The utter failure and inability of the defendant to perform its contract from its inception having been admitted, the defendant holds plaintiff's money without any consideration therefor, and an action will lie to recover back the money thus paid without consideration. (*Weller v. Tuthill*, 66 N. Y. 347; *Freer v. Denton*, 61 id. 492; *Wright v. Hooker*, 10 id. 59; *Conaughty v. Nichols*, 42 id. 86.) It cannot be claimed that the company had no right to make such a special contract. It made it, and has received plaintiff's money under it. The plea of *ultra vires* cannot avail the defendant. (*Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 262; *Mad. Ave. Bap. Ch. v. Oliver St. B. C.*, 73 id. 90; *Whitney Arms Co. v. Barlow*, 63 id. 62; *Kent v. Quicksilver Mining Co.*, 78 id. 159.) Having admitted the contract, and not having pleaded the statute of frauds, or in-

Statement of case.

sisted upon it in its answer, the defendant is deemed to have renounced the benefit of it. (*Harris v. Knickerbocker*, 5 Wend. 638; *Cozine v. Graham*, 2 Paige, 177; *Duffy v. O'Donovan*, 46 N. Y. 226; *Bommer v. Am. Spiral, etc., Hinge Mfg. Co.*, 81 id. 468; *Marston v. Sweet*, 66 id. 209.) Even if it were true that the plaintiff has alleged an improper measure of damages, that fact cannot be taken advantage of by demurrer. (*Wetmore v. Porter*, 92 N. Y. 80.)

Wm. B. Hornblower for respondent. So far as the complaint sets forth a contract different from that contained in the policy it is demurrable. (1 Greenl. on Ev., § 275; 2 Whart. on Ev., §§ 920, 1014; *Taylor v. Riggs*, 1 Pet. 600; *Ins. Co. v. Mowry*, 96 U. S. 544; *White v. Ashton*, 51 N. Y. 280; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 283; *Imham v. Child*, 1 Bro. 92; *Pohalski v. Mutual L. Ins. Co.*, 36 N. Y. Supr. Ct. 234; affirmed, 56 id. 640; *Harper v. Albany Mutual Ins. Co.*, 17 N. Y. 194; *Lamott v. Hudson River Fire Ins. Co.*, id. 199, note; *Howell v. Knickerbocker L. Ins. Co.*, 23 id. 516; *Mayor, etc., v. Brooklyn Fire Ins. Co.*, 41 Barb. 231; *Renner v. Bank of Columbia*, 9 Wheat. 587; *Hunt v. Rousmanier*, 8 id. 211; *Bk. of U. S. v. Dunn*, 6 Peters, 51; *Renard v. Sampson*, 12 N. Y. 561; *Hoare v. Graham*, 3 Camp. 56; *Brown v. Wiley*, 20 How. 442; *Specht v. Howard*, 16 Wall. 564; *Brown v. Spofford*, 95 U. S. 482; *Martin v. Cole*, 104 id. 30.) The policy being set forth in full in the complaint, our demurrer admits only the agreement as set forth in the policy. So far as the allegations of the complaint purport to construe or interpret the provisions of the policy, our demurrer does not admit of such allegations. (*Buffalo Catholic Institute v. Bitter*, 87 N. Y. 250; *Bonnell v. Griswold*, 68 id. 294; *Dillon v. Barnard*, 21 Wall. 430; *U. S. v. Ames*, 99 U. S. 35.) This is not a case in which parol evidence is required to explain technical words, or to annex incidents. (Greenl. on Ev., §§ 294, 295.) The general allegation in the complaint that defendant did not keep or perform any of the conditions of said policy amounts to nothing. This

Statement of case.

general allegation is explained and qualified by what precedes and follows as to the particular conditions claimed by plaintiff to be contained in the policy, and claimed to have been violated. (*Clark v. Dillon*, 97 N. Y. 370, 373; *Speer v. Downing*, 36 Barb. 522; *Conger v. Hudson R. R. Co.*, 12 N. Y. 190; *Bunge v. Koop*, 48 id. 225; *Bates v. Rosekrans*, 23 How. Pr. 98; *Knapp v. City of Brooklyn*, 97 N. Y. 520; *Southwick v. First Nat. Bank*, 84 id. 429; *Suprs. v. Decker*, 30 Wis. 624, 633; *Riley v. Riley*, 34 id. 376; *Drum v. Horton*, 1 Pinney [Wis.], 456.) The relations of a policyholder to a mutual insurance company are not those of a *cestui que trust* to a trustee, but those of a contracting party to another contracting party, and their relative rights and liabilities are to be determined by the contract. (*Taylor v. C. O. L. Ins. Co.*, 9 Daly, 489; *Hincker v. U. S. L. Ins. Co.*, 16 N. Y. [1 Weekly Dig.] 44; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84; *People v. Security L. Ins. Co.*, 73 N. Y. 114; *Bingley v. Eq. L. As. Soc.*, 61 How. Pr. 346.) The statute of frauds applies to this case so far as the ten-year dividend scheme is concerned, and hence no parol evidence would be admissible to add to or vary the terms of the contract in that particular. (*Trustees, etc., v. Bklyn. F. Ins. Co.*, 19 N. Y. 307; *Shute v. Dorr*, 5 Wend. 204, 206, 207; *Browne on Stat. of Frauds*, § 232; *Packet Co. v. Sickles*, 5 Wall. 580, 595; *Birch v. Earl of Liverpool*, 9 B. & C. 392; *Dobson v. Espie*, 2 H. & N. 81; *Doyle v. Dixon*, 97 Mass. 211; *Peters v. Westborough*, 19 Pick. 364; *Hill v. Hooper*, 1 Gray, 131; *Boydell v. Drummond*, 11 East, 156, 159; *Harris v. Porter*, 2 Harr. [Del.] 27; *Foot v. Emerson*, 10 Vt. 338; *Lockwood v. Barnes*, 3 Hill, 128; *Weir v. Hill*, 2 Lans. 278; *Broadwell v. Getman*, 2 Den. 87; *Tolley v. Greene*, 2 Sandf. Ch. 91; *Durand v. Curtis*, 57 N. Y. 7; *Kellogg v. Clark*, 23 Hun, 393; *Bernier v. Cabot Mfg. Co.*, 71 Me. 506.) The agreement which the plaintiff seeks to engraft on the policy was of the very essence of the contract, and provided for the method of administering and distributing the ten-year dividend funds. It cannot in any sense be considered as collateral. (*Eighmie*

Opinion of the Court, per RUGER, Ch. J.

v. *Taylor*, 90 N. Y. 238.) Prior written negotiations and representations are merged in the subsequent written contract as much as oral negotiations and representations are, unless expressly referred to and made a part of the written contract. (2 Pars. on Cont. 548; *Vandervoort v. Smith*, 2 Caines, 155, 161; *Munford v. McPherson*, 1 Johns. 414; *Riley v. City of Brooklyn*, 46 N. Y. 444, 446.)

RUGER, Ch. J. The appellant asserts in the brief used on the argument, that the count of the complaint demurred to, states a cause of action *ex contractu* alone. and we are also of the same opinion.

It is essential to the legal statement of such a cause of action that it should show an existing contract, and the performance by the plaintiff of such conditions precedent as are thereby provided, or a tender of their performance, or some adequate excuse for non-performance. This may be done by a general allegation of performance, but in some form the fact must be alleged, and if controverted, proved on the trial. (Code of Civ. Pro. 533.)

The cause of action stated in this count is for an alleged breach of the conditions of a policy of insurance dated Nov. 3, 1871, and which purports to have been issued by the defendant to the plaintiff upon the life of her husband, and is stated to be in consideration of the sum of \$377.45 to them in hand paid, and of the annual premium of \$377.45 to be paid "in every year during the continuance of this policy until ten full years premiums shall have been paid." It further provides that "If the premiums as above stipulated" shall not be paid, "then and in every such case this company shall not be liable for the payment of the sum aforesaid, or any part thereof, and this policy shall cease and determine." "In every case when this policy shall cease and determine or become null and void, all payments thereon shall be forfeited to this company, and no action or right of action shall remain to or be maintained against the company by the assured, or by any other person by virtue of this policy or any thing connected therewith;" "that this

policy is issued on the ten-year dividend system," and "that the ten-year dividend period for this policy shall be completed" on the 3d day of November, 1881; "that no dividend shall be allowed or paid upon this policy unless the person whose life is assured shall survive until the completion of its ten-year dividend period and unless the policy shall then be in force." The complaint alleges payment of the annual premium stipulated for only to the 3d day of November, 1879, and this action was commenced on the 28th day of January, 1881, nearly a year before default could be made in the payment of dividends on the insurance, and more than a year after the policy had ceased to be an existing contract, unless some adequate reason is alleged for the non-payment of premiums by the plaintiff.

The contract, as pleaded, provides for the regular payment by the assured of the annual premiums, and such payments are made the condition of any claim thereunder, and the non-payment of such premiums causes the policy to become null and void and forfeits to the company all payments made thereon. These conditions were lawful; the parties were competent to enter into them, and unless performance or its equivalent is alleged, the plaintiff has failed to state a good cause of action, and must abide by the case as shown by her complaint.

The statement in the complaint with reference to the payment of the annual premiums, is equivalent to an admission that they were not paid after November, 1879, and contains no allegation that she was in any way prevented by defendant from performing, but it is now argued that the alleged non-performance by the defendant of certain obligations alleged to have been assumed by it, may be considered as equivalent to an allegation of performance by her. We are very clearly of the opinion that this claim is not substantiated by the terms of the contract, or the allegations of the complaint. The failure of one party to a contract to perform some of its obligations, when it consists of a number of independent provisions, furnishes no excuse for non-performance, to the other party. It is only when the non-performance, is of a condition precedent, or where such party has wholly refused to perform, or has wholly disabled

Opinion of the Court, per RUGER, Ch. J.

himself from completing a substantial performance, that the other party is relieved from performance, or a tender thereof. (*People v. Empire Mutual L. Ins. Co.*, 92 N. Y. 105, 109; *Shaw v. Republic L. Ins. Co.*, 69 id. 286, 293.)

The complaint alleges the obligations of the defendant charged as not performed by it in the following language: "That by the contract or policy of insurance issued to her as aforesaid, *a copy of which is hereto annexed*, the defendant then and there bound itself to *receive and keep separate* all the premiums paid upon policies of the same class to which her policy belonged as aforesaid, and to *keep as a separate fund* all the incomes, profits and accumulations that should accrue therefrom, or upon policies of the insured in such class, and to add thereto as forming part of and in addition to the fund so created for said class to which the plaintiff belonged, the shares of those members who should die during the ten-year dividend or Tontine period, the shares of those members which should become forfeited for any cause during said term, and all accumulations and profits belonging thereto, and to declare annual dividends of the income and profits so derived, and to invest and reinvest from year to year the dividends so derived until the end of the ten-year dividend or Tontine period, and to hold the same in trust, and then to divide the same to the survivors of the class to which the plaintiff belonged." The appellant's contention is that the defendant's neglect to keep and invest separately the funds referred to, justified the plaintiff in her neglect to perform, and established a cause of action against defendant. The policy is annexed to, and by the clause quoted is made a part of, the complaint.

Assuming for the present that the facts alleged, have been so pleaded, as to entitle the plaintiff to urge them as an excuse for her admitted non-performance, we are brought to an inquiry as to their sufficiency for such purpose. This depends upon the considerations: 1. Whether the complaint correctly describes the obligations assumed by the defendant; 2. Whether the obligations, in fact, assumed by it constituted material conditions of the contract; 3. Whether there is a sufficient alle-

gation of the non-performance of them by defendant ; and 4. Whether their non-performance was the occasion of injury to the plaintiff. These questions must be determined by an examination of the policy, and a consideration of its provisions.

In interposing the demurrer, the defendant did not thereby admit the construction put upon the contract by the pleading demurred to, or the correctness of inferences, drawn from the facts admitted, but only the truth of such facts as were properly stated therein. (*Bonnell v. Griswold*, 68 N. Y. 294 ; *Buffalo Catholic Institute v. Bitter*, 87 id. 250.)

The contract itself having been set forth, the rights of the parties must be determined by the terms of that instrument, as construed by the court. Reference thereto shows that the material obligations assumed by the defendant, related to the payment to the assured, or in the event of her death, to certain other persons described, the sum of \$5,000, upon the death of Abraham Borgardus ; and (2) in case the said Bogardus survived for a period of ten years and the said policy should continue in force until that time, the payment in cash or in annuity bonds to the said assured, or upon her direction, of a proportional share of the aggregate sum produced by the accumulations of dividends, accretions and interest, during the period of ten years, from a fund to be created by certain contributions furnished by a class of policy-holders, consisting of those who effected insurance on the Tontine plan during the year 1871 ; (3) That the surplus and profits derivable from certain described funds, shall be equitably apportioned among the surviving policy-holders belonging to the class from which such funds were derived.

The obligations assumed in the policy are not changed or enlarged by the consent of the assured, given in the application for insurance to the defendant, to place all dividends accruing on her policy in a reserve fund. That provision merely waives the right of the assured to demand immediate payment, of any annual dividend to which she might be entitled. No express obligations are assumed by the defendant either in the policy or by the application with reference to the management or in-

Opinion of the Court, per RUGER, Ch. J.

vestment of the funds in question, and the Tontine plan is referred to as a known and understood system of insurance, pursued by all life insurance companies of similar character to determine in a certain contingency, the extent of the company's liability to a special class of its policy-holders. It contemplates the union of the interests of a large number of persons, and the administration of a fund for their mutual benefit, and from its very nature is incapable of being moulded and managed, to meet the special requirements of particular individuals. Upon the accession of any person to this class, he becomes interested in the contributions of every other member, and neither of them can afterward withdraw his contribution, without injury to the rights of all others interested in the fund. It is the very nature of a corporate company carrying on the business of insurance, that it should be subjected, at indefinite periods to the payment of large expenses, and the incurrence of large liabilities and risks, and its only resource, for the satisfaction of such obligations consists in the fund created by the premiums paid to it by its policy-holders. This fund is necessarily subjected to drafts upon it for uncertain amounts at uncertain intervals, and to require changes of its investments, and is incapable either in its entirety, or any specific part thereof, of being kept invested and managed separately from all other funds.

We, therefore, think that the use of these moneys in connection with its other funds, and their investment and management according to the mode, which, in the judgment of the defendant, was best adapted to promote the interests of all of its policy-holders, was entirely legitimate and in accordance with the true meaning of the contract. The Tontine plan undoubtedly contemplated such action, on the part of the insurers, as would enable them, at the expiration of the ten-year dividend period, to determine the aggregate of such dividends, accretions and interest, and to divide the same among the survivors of the class to which they belonged, according to their respective rights therein; but it seems to us, that it does not involve the necessity of keeping separate from its other funds, either the premiums paid by such class or their profits or

accumulations, or the duty of separately handling, investing or accumulating such funds.

The complaint does not allege that the defendant has failed to keep such an account of these funds as will enable it to determine their amount, and the respective shares of the participants therein; but the argument assumes that this is impossible, unless they are separately kept and invested. We do not think this is necessarily true. The method to be adopted by the defendant in managing the funds paid to it by its several policy-holders was necessarily, under the insurance laws of the State, confided to its judgment, discretion and skill, and the plaintiff has no cause for complaint in reference thereto, except in the event of the survivorship of Abraham Bogardus for ten years, and the continued existence of her policy. Upon the happening of such event, and not until then, she would become entitled to an accounting as to such fund.

No reason is alleged in the complaint why the rights of the respective parties entitled thereto are not determinable from the data kept by the company, and we are unable to perceive any insuperable obstacle, to a proper accounting as to such moneys, in the fact of an omission by the company to keep and invest them separately from its other fund.

It does not enlarge the liability of the defendant to the plaintiff to denominate the relations between them as those of trustee and *cestui que trust*, because if the defendant had any trust duty to perform in relation to such fund it was expressed in the policy, and was simply to receive, keep and invest it carefully and prudently and so as to be able to divide it, and its accumulations, among those who should prove to be entitled thereto, at the expiration of the prescribed period. We are, therefore, of the opinion that the policy did not require the defendant to keep and invest the funds referred to separately, and that no breach of its contract is stated in the allegation that it neglected to do so.

We are also of the opinion that even if an obligation to do so could be implied from the provisions of the policy, that it

furnishes no excuse for the non-performance by the plaintiff of her contract.

The provision of the policy relating to an investment of the dividends upon the Tontine plan, was simply an incident of the main object of the contract of insurance. It was entirely problematical whether there would be any increase of the fund, or dividends, upon the investment, or whether any claimant would live to realize his interest therein, and a failure in the performance of this part of the contract was of minor importance, and could not operate as an excuse for non-performance by the assured of her obligations. It is elementary that where agreements go to a part only of the consideration on both sides, and a breach may be paid for in damages, that the promises are independent. (2 Pars. on Cont. 677.)

There is no allegation in the complaint of the insolvency of the defendant, or its inability to respond in damages for any breach of its contract. Its liability was purely a pecuniary obligation and capable of being fully performed by the payment of money, or its equivalent. The method by which the Tontine fund was created and managed, was designed simply as a means of determining the amount to which the policy-holder would be entitled in a certain event, and there is no difficulty in ascertaining such amount, in the case of a breach by the defendant of the contract relating to the mode of managing the fund. For this reason also we are of the opinion that the complaint does not allege a sufficient excuse for the non-performance by the plaintiff, of the precedent conditions of her contract.

In considering the questions presented, we have not omitted to observe the claim made by the plaintiff, that the action can be sustained upon the theory of an agreement existing outside of the policy, and contracted simultaneously with it. This claim is attempted to be supported by importing into the count demurred to, the allegations of the first count purporting to state a cause of action in tort. We can hardly conceive a more incongruous or objectionable method of framing a cause of action than that attempted in this case; but inasmuch

as we are of the opinion that even in that way, no cause of action *ex contractu* is legally stated we refrain from criticising the method pursued.

The second count of the complaint states that the plaintiff there "repeats and reiterates all the allegations hereinbefore contained, and makes them a part of this her second cause of action." The allegations material to the question under discussion contained in the first count are substantially as follows: That the defendant is a domestic corporation, organized under the laws of the State of New York for the purpose of insuring lives, and that prior to the time of issuing the policy in question, it had done a large business in the various branches of life insurance, and through its officers and agents for the purpose of inducing the plaintiff to take a policy from such company on the Tontine or ten-year dividend plan, represented that they were then doing business on that plan, and that it gave many and great advantages over the ordinary mode of life insurance. The count further states that certain explanations as to the practical operation of the Tontine plan were made to the plaintiff, but the details of such explanations are not material in this connection. It then proceeds to state that the defendant on the 3d day of November, 1871, issued its policy to the plaintiff, upon the life of Abraham Bogardus, for an insurance of \$5,000, on the ten-year dividend system of insurance, and in that connection avers that "the defendant then and there represented that it had received and kept separate, and would receive and keep separate all premiums paid upon policies of the same class to which the policy" "of the plaintiff belonged," etc., and the further allegation that such representations were false and fraudulent and were relied upon by the plaintiff in accepting the policy.

Assuming that these allegations are properly incorporated in the second count, they must be construed in connection with the allegations of that count; and if any inconsistency between the two is found to exist, the allegations contained in the second count must, for obvious reasons, be adopted as containing the statements intended to be relied on by the pleader. It will be

observed that the second count also contains allegations referring to the representations made by the defendant, but they are there expressly referred to as having been made by the policy itself, while in the first count it is inferentially only that they are so stated.

It could very justly be held that the pleader did not intend by the reference in question, to repeat the allegations as to representations, or to incorporate in the second count allegations peculiar to an action of tort, and not pertinent and material to the cause of action, there intended to be stated. While it was proper and necessary to the validity of the second count to incorporate therein the allegations referring to the organization of the company and the execution and delivery of the policy in question, it was obviously unnecessary and highly objectionable to repeat therein, the allegations intended to charge the defendant with the commission of a tort.

It is not now claimed by the appellant that she is entitled to recover under the second count for any other cause of action than one arising *ex contractu*, and in view of these circumstances it might well be said that the pleader did not intend to include in the second count any of the allegations of the first, importing the commission of a fraud.

Being of the opinion that there are other reasons why the incorporation in the second count of the allegations of the first does not entitle the plaintiff to maintain a cause of action *ex contractu*, we refrain from disposing of the case on the grounds above referred to.

The first objection to the plaintiff's contention is, that assuming there were actionable representations, made by the defendant to the plaintiff, they were made at the time of and concurrently with the issuing of the policy, and were necessarily incident to, and dependent upon, the principal agreement of insurance thereby effected, and must stand or fall with the cause of action based thereon.

The condition precedent of the regular payment of annual premiums by the plaintiff applies as well to the incidents of the contract as to its express provisions, and furnishes the same

Opinion of the Court, per RUGER, Ch. J.

defense to an action based thereon as we have seen it does to the action on the policy.

It must, of course, be borne in mind that we are now inquiring only whether the plaintiff has alleged in her complaint any sufficient excuse for omitting to pay the annual premiums.

Secondly, we are also of the opinion that the statement contained in the first count does not show any actionable cause resting in contract against the defendant. It simply alleges that the defendant made certain representations as to its past and future conduct, but those representations were not alleged to have been a warranty, or to have been made under such circumstances and in such form and manner, as to constitute a valid contract. A mere representation made during the pendency of negotiations for a contract is not actionable *ex contractu* even if untrue. It must be alleged to have been material, and made under such circumstances as to constitute a contract, and show it to have been intended as a warranty of the fact represented to sustain such a cause of action. (*Swett v. Colgate*, 20 Johns. 196; *Ross v. Mather*, 51 N. Y. 108, 110; *Moore v. Noble*, 53 Barb. 425.) A warranty may be inferred from proof of a representation, but the naked allegation of a representation, is not equivalent to an allegation of a warranty or a contract. A representation is simply evidence from which a contract may or may not be inferred, and it is a fundamental rule of pleading, under all systems, that the facts constituting a cause of action must be alleged, and not the evidence of such facts.

We are further of the opinion that the representation in question is substantially the same as that alleged in the second count and is not a material representation, authorizing the plaintiff to omit the performance of the conditions assumed by her. This question has already been sufficiently discussed; and we conclude that, for the reason stated, the judgment must be affirmed and judgment absolute ordered for defendant.

All concur.

Judgment affirmed.

101 344
150 280

WHITE'S BANK OF BUFFALO et al., Respondents, v. MATILDA FARTHING et al., Appellants.

While judgment creditors, holding distinct and several judgments, may unite in an action to set aside a conveyance of land by the common debtor, made in fraud of their rights as creditors, they are not all necessary parties to such an action, and where one of them has commenced such an action, the Code of Civil Procedure (§ 453) does not require the court to compel the plaintiffs to bring in the other judgment creditors.

An order, therefore, denying a motion of other judgment creditors to be allowed to intervene in such an action is discretionary and is not reviewable here.

People v. A. & V. R. R. Co. (77 N. Y. 232), *Osterhoudt v. Supervisors* (98 id. 239), distinguished.

It seems that the judgments are liens upon the land in the order of their docketing, and if the plaintiff in the action to set aside the conveyance succeeds in establishing the fraud, he is entitled to a judgment setting aside the conveyance simply, or the court may compel the fraudulent grantee to convey the lands to a receiver, to be sold to satisfy plaintiff's judgment. If it simply sets aside the conveyance, the land will remain charged with the liens of the several judgments in their order; if it appoints a receiver and directs a conveyance to him, and the plaintiff in the action is a junior judgment creditor, a purchaser under the receiver's sale will take as of the time of the debtor's conveyance to the receiver, subject, however, to the liens of the prior judgments.

The result, therefore, in either case will not affect the liens of said judgments.

In such an action plaintiff also sought to charge certain other lands with the lien of its judgment, on the ground that the defendant was entitled to it as devisee of G., who had caused it to be conveyed to K. as security for a debt which had since been paid. *Held*, that this did not entitle the senior judgment creditors to intervene, as a judgment in accordance with the relief demanded would not prejudice any right which they might have to enforce their judgments against the lands.

(Argued January 19, 1886; decided January 26, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made April 23, 1885, affirming an order of the Special Term denying motions on the part of the German-American Bank of Buffalo, the Merchants' Bank of Buffalo, the Third National Bank of Buffalo,

Statement of case.

and others, that they might be brought in as parties defendant herein.

The action was brought by plaintiff as judgment creditor of the defendant Matilda Farthing, to set aside certain conveyances of real estate made by her, which were alleged to be fraudulent as against creditors, and for the sale of such real estate, etc.; also to have plaintiff's judgment declared to be a lien on certain other lands.

The facts so far as material are stated in the opinion.

Adelbert Moot for appellants. The appellants each have an interest in the subject of the action, and in real property the title to which is to be in some manner affected by the judgment; and as they have made application therefor, the court must direct them to be brought in by a proper amendment of the summons and complaint. (Code of Civ. Pro., §§ 448, 452; *People v. A. & V. R. Co.*, 77 N. Y. 232; *Osterhout v. Board of Supervisors, etc.*, 98 id. 239; *Jeffries v. Cochrane*, 57 Barb. 551; *Edmeston v. Lyde*, 1 Paige, 637; *Beck v. Burdette*, id. 305; *Corning v. White*, 2 id. 567; *Ballou v. Boland*, 14 Hun, 355; *Boynnton v. Rayson*, Clarke, 584; *Fitch v. Smith*, 10 Paige, 9; *Safford v. Douglass*, 4 Edw. 537; *Brown v. Nichols*, 42 N. Y. 26; *Haddon v. Spader*, 20 Johns. 554; *Lynch v. Johnson*, 48 N. Y. 27; *Erickson v. Quinn*, 15 Abb. [N. S.] 166.) It is clear that Kelly, upon plaintiff's own showing, holds the property seventhly described, in trust for creditors; he is, therefore, a trustee thereof, the appellants are really *cestuis que trust*, and standing in that position they have a right to intervene, for they are real, beneficial, equitable owners of the property. (1 R. S. 728, § 52; 3 R. S. [7th ed.] 2181, § 52; *Travis v. Meyers*, 67 N. Y. 542; *Kerr v. Blodgett*, 48 id. 62.)

Truman C. White for respondents. Elizabeth Farthing is not a necessary party, because the title to the premises upon which she holds the mortgage being still in Matilda Farthing, those premises can be, and at all times since the appellants recovered their judgments could have been, sold upon execution, and the

purchaser at such sale would get a perfect title as against her mortgage, if it be in fact invalid or held in trust for the owner of the fee. (*Chautauqua Co. Bk. v. Risley*, 19 N. Y. 369.) By prosecuting this suit the plaintiffs are rewarded as vigilant creditors, and the commencement of the action is regarded in equity as an actual levy upon the equitable assets of the debtor. All the title the defendants have in the property alleged to have been fraudulently transferred becomes subject to and bound by that lien. (*Jeffries v. Cochrane*, 57 Barb. 557; *Edmeston v. Lyde*, 1 Paige, 637; *Beck v. Burdette*, id. 305; *Corning v. White*, 2 id. 567; *Ballou v. Boland*, 14 Hun, 355; *Boynton v. Rawson*, Clarke, 584; *Fitch v. Smith*, 10 Paige, 9; *Safford v. Douglass*, 4 Edw. 537; *Brown v. Nichols*, 42 N. Y. 26; *Hadden v. Spader*, 20 Johns. 554.) When several judgments are rendered against a debtor, after he has fraudulently conveyed his property, the judgment creditor who first sets aside the title of the fraudulent grantee and subjects the property to payment of his judgment obtains priority over other judgment creditors though claiming under judgments prior to his own. (*Edmeston v. Lyde*, 1 Paige, 637; *Lynch v. Johnson*, 48 N. Y. 27; *Spring v. Short*, 90 id. 538.) The appellants have no "interest" in the premises covered by the Kelly mortgage, within the meaning of section 452 of the Code. They only have a general lien upon those and all other premises in the same county, belonging to the judgment debtors. (Pom. Eq. Jur., §§ 1057, 1233, 1234, and notes.)

ANDREWS, J. The judgments in favor of the German-American Bank, were recovered November 13, 1883, and the deficiency judgment in favor of the banks other than the plaintiff, April 8, 1884. The judgment in favor of the plaintiff's bank was recovered February 4, 1884, and this action was commenced November 14, 1884. The several judgments became liens on lands fraudulently conveyed by Matilda Farthing, the judgment debtor, in the order of their docketing, and they could have been sold on executions issued on the judgments. The plaintiff however elected to bring its action to remove the

alleged fraudulent obstruction created by the conveyances. If it succeeds in establishing the fraud it will be entitled to a judgment setting aside the conveyances simply, in which case it can proceed to enforce its judgment by a sale of the land on execution unembarrassed by the cloud created, or the court may proceed further and compel the fraudulent grantees to convey the lands to a receiver to be sold to satisfy the plaintiff's judgment. The judgments in favor of the other banks will in no way be affected whichever form the judgment in this action may take. If it simply sets aside the fraudulent conveyances, the land will remain charged with the liens of the several judgments in the order of their docketing, and the proceedings to enforce them will be regulated by the statute. If it goes further and appoints a receiver and directs a conveyance to him, a purchaser under the receiver's sale will take title as of the time of the debtor's conveyance to the receiver, subject however to the judgments in favor of the banks other than the plaintiff. (*Chautauque County Bank v. Risley*, 19 N. Y. 369.) The result of the plaintiffs' action will not therefore affect the lien of the judgments in favor of the other banks who seek to intervene in this action. The plaintiffs seek also to charge the Swan street lot, with the lien of its judgment, on the ground that George Farthing caused it to be conveyed to Kelly as security for a debt owing by him to Kelly which has been since paid, and that the judgment debtor, Matilda Farthing, as the devisee of George Farthing, is entitled to the land. The other banks may commence similar actions to reach the Swan street lot, and the plaintiffs' action, followed by judgment in accordance with the relief demanded will not prejudice any rights which the other banks may have to enforce their judgments against it. According to the rule established in this State, judgment creditors holding distinct and several judgments may unite in an action to set aside a conveyance by the common debtor, made in fraud of their rights as creditors. (*Brinkerhoff v. Brown*, 6 Johns. Ch. 139.) This is a convenient rule, but it is not a rule of obligation, but one conferring authority merely. It has never been held that all judgment creditors so situated were necessary

Statement of case.

parties to such an action. We think section 452 of the Code does not require the court on application to compel a plaintiff to bring in a judgment creditor not originally made a party, as a party to an action instituted by him to set aside a fraudulent conveyance, although its power to direct it to be done cannot be doubted. The rights of the creditor not made a party, will not be prejudiced by the judgment in the action. A judgment creditor has no title to the land of the judgment debtor, but a lien only, which may, by subsequent proceedings become the foundation of title, nor has he any interest in the subject-matter of the action brought by another judgment creditor within the meaning of the section. He may have an interest which will be subserved by having the conveyance set aside. But he will not be concluded by a denial of that relief in the action of the other creditor, and whatever the result of that action may be, his rights and remedies remain as before. The cases of *People v. Albany & V. R. R. Co.* (77 N. Y. 232), and *Osterhoudt v. Supervisors, etc.* (98 id. 239), cited by the appellants are not analogous. No effectual judgments could be rendered in those actions, without directly cutting off or impairing rights of persons not parties, and it was held in accordance with the settled rule in equity that they should be brought in so that there might be a complete determination of the controversy.

We think the order appealed from was discretionary and that the appeal should, therefore, be dismissed.

All concur.

Appeal dismissed.

101 348
111 500
101 348
194 636

101 348
127 376
101 348
141 345

AUGUSTUS R. GRIFFIN, Receiver, etc., Respondent, v. THE
LONG ISLAND RAILROAD Co., Appellant.

101 848
171 2181

Where an action to recover a chattel is based solely upon a wrongful detention, a general denial puts in issue, as well, plaintiffs' property in the chattel as the wrongful detention, and defendant under such a plea may

Statement of case.

show title in a stranger although he does not connect himself with such title.

Where an answer, after sufficiently admitting or denying certain allegations of the complaint, denies each and every allegation not thus admitted or denied, this is a good general denial.

Clark v. Dillon (97 N. Y. 370), distinguished.

(Argued January 19, 1886 ; decided February 2, 1886.)

APPEAL from the judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 11, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

Edward C. Sprague for appellant. Plaintiff having merely proved the bare fact of defendant's possession, defendant should have been allowed to prove its ownership of the cars although not set up in its answer. (*Knapp v. Roche*, 94 N. J. 333; *Weaver v. Barden*, 49 id. 297; *Stowell v. Otis*, 71 id. 38; *Beatty v. Swartout*, 32 Barb. 293; *Anistici v. Holmes*, 3 Den. 244; *Seidenbach v. Riely*, 36 Hun, 211.) Plaintiff is restricted to the theory which he has chosen, and cannot now claim that his recovery was for a cause of action which he made no effort to establish upon the trial. (*Genet v. D. & H. C. Co.*, Ct. of App., 13 N. Y. Weekly Dig. 200; *McKeon v. See*, 51 N. Y. 300; *Sherman v. Parish*, 53 id. 388; *Tyng v. Warehouse Co.*, 58 id. 313; *King v. McKellar*, 94 id. 317; *Stowell v. Otis*, 71 id. 38; *Greenfield v. Mass. Mut. Life Ins. Co.*, 47 id. 437; *Davis v. Hoppock*, 6 Duer, 254; *Miller v. Decker*, 40 Barb. 234; *Robinson v. Frost*, 14 id. 536; *Shoenrock v. Farley*, 49 Super. Ct. 302.) Defendant's allegation that the property referred to in the complaint had been in possession of the Southern Railroad Company of Long Island, and its assigns claiming title thereto for more than six years prior to the commencement of this action, was a sufficient allegation,

Statement of case.

within section 1723 of the Code of Civil Procedure, that a third person as against the defendant was entitled to the chattels. (*Thomas v. Desmond*, 12 How. Pr. 321; *Whiton v. Snider*, 83 N. Y. 314; *Rawley v. Brown*, 71 id. 85; *Turner v. Brown*, 6 Hun, 331; *Hemmingway v. Poucher*, 93 N. Y. 283; *Wall v. Buff. Water Works Co.*, 18 id. 119; *Olcott v. Carroll*, 39 id. 436; *Acer v. Hotchkiss*, 97 id. 395.) The time for the running of the statute must be computed from the time when the right to make the demand was complete. (*Dickinson v. Mayor, etc.*, 92 N. Y. 584; *Drake v. Wilkin*, 30 Hun, 537.)

Augustus N. Weller for respondent. Defendant not having set up the title in its answer nor in any manner informed plaintiff of the claim, no error was committed by the court in refusing to allow it to show title to the cars in another corporation. (*Howell v. Otis*, 71 N. Y. 36; 69 id. 48; 38 id. 161; 3 Denio, 244; 12 Wend. 30; 33 Barb. 229; 31 N. Y. 614; 14 Abb. 147; 46 Barb. 642; *McKyring v. Bull*, 16 N. Y. 297; 18 How. 144; 12 Abb. [N. S.] 139; 13 How. 273, 565; 12 N. Y. 9; 33 id. 31; 73 id. 496; 17 Weekly Dig. 7; 84 N. Y. 420.) Alleging that the property had been in the possession of the Southern Railroad Company claiming title thereto for more than six years prior to the commencement of the action, does not set up title in that company, nor is it any notice that defendant relied on such title as a defense. (*Dewey v. Moyer*, 72 N. Y. 70, 77.) Plaintiff's title was not in dispute because defendant's answer did not controvert it. (17 Weekly Dig. 528; 5 Law Bull. 64; 3 Civ. Pro. R. 227; *Clark v. Dillon*, 2 McCarty's Civ. Pro. R. 73; 9 Abb. N. C. 303; 1 Civ. Pro. R. 252; 53 How. Pr. 251; *Melville Manufacturing Co. v. Salter*, Daily Reg., April 27, 1885; *Potter v. Frail*, 67 How. 145; *Clark v. Dillon*, 97 N. Y. 370.) The period of limitations must be computed from the time of the accruing of the right of action. (Code, § 416.) The mortgagees whom plaintiff represents could bring no action to recover the property, nor for its conversion, until the default in the pay-

Opinion of the Court, per EARL, J.

ment of the mortgage gave them the right of possession. (*Goelet v. Asseler*, 22 N. Y. 225; *Hull v. Carnley*, 1 Kern. 501; *S. C.*, 17 N. Y. 202; *Carpenter v. Town*, Lalor's Supp. to Hill & Denio; *Gordon v. Harper*, 7 Johns. 8; *Bradley v. Copley*, Mann., Gr. & Scott, 685; *Fen v. Bittleston*, 8 Eng. Law & Eq. 485; 5 Duer, 434; 28 N. Y. 586.)

EARL, J. This action was brought to recover the possession of two railroad cars. The plaintiff in his complaint alleged that he was the receiver of the Southern Hempstead Branch Railroad Company, and that he as such became entitled to the two cars; that some time between the 1st of July, 1875, and the 1st of July, 1878, the defendant took from the possession of his railroad company the two cars, then the property of that company; that the cars were in the possession of the defendant and had been for several years, but that the defendant refused to deliver the same to the plaintiff, although before this action was commenced he made a demand in writing upon it so to do, and that it unjustly detained them from him. There is no allegation in the complaint that the defendant wrongfully took possession of the cars or wrongfully became possessed of them. The only wrong alleged is the refusal of the defendant to deliver the cars to the plaintiff upon his demand and the detention of them from him after that. The defendant in its answer alleged that it had no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the complaint of the appointment of the plaintiff as receiver; admitted that the plaintiff had made a demand in writing of it to deliver the cars, and that it had not delivered them; denied on information and belief each and every allegation of the complaint not before admitted or controverted; alleged on information and belief that the cause of action set forth in the complaint did not accrue within six years before the commencement of the action, and that the property referred to in the complaint had been in the possession of the Southern Railroad Company of Long Island, and its assigns, claiming title thereto

Opinion of the Court, per EARL, J.

for more than six years prior to the commencement of this action.

Upon the trial the plaintiff gave evidence tending to show that the Southern Hempstead Branch Railroad Company owned the cars and that the title to them came to him as receiver of that company; and he proved the value of the cars and then rested. The defendant offered to show a sale of the two cars to the Southern Railroad Company of Long Island by the persons who owned them before they were claimed to have been sold to the plaintiff's railroad company. The plaintiff objected to the evidence and the objection was sustained, the court ruling that the question of title in a third party was not raised by the pleadings, and the defendant excepted to the ruling. Later in the progress of the trial, the defendant offered to prove title in the Southern Railroad Company, of Long Island, and its successor, the Brooklyn and Montauk Railroad Company, and that it was the lessee of the latter company and as such in possession of all its property. The evidence was objected to by the plaintiff, and the objection sustained on the ground that the title had not been set up in the answer, and the defendant excepted to the ruling. In these rulings excluding evidence of title to the cars out of the plaintiff, we think the court erred.

The action to recover a chattel, as regulated by the Code of Civil Procedure, is substantially a substitute for the action of replevin as it had previously existed. At common law and under the Revised Statutes there were two actions of replevin, one in the *cepit* and one in the *detinet*. In replevin in the *cepit* the general issue was tendered by the plea of *non cepit*, and that put in issue only the taking at the place stated in the declaration. That rule of the common law was copied into the Revised Statutes. (2 R. S. 528, § 39.) Under that plea the defendant could not show title in himself or in a stranger. As it was necessary in such an action for the plaintiff only to show that he was in possession of the property and that the defendant wrongfully took it from his possession, the plea put in issue all plaintiff was, in the first instance, bound to prove. Without more, property in a third person could be no defense to such an

action. Therefore, in order to defend such an action, the defendant was bound to prove either property in himself, or property in a third person with which he was in some way connected and under which he could justify, and the facts he was bound specially to allege.

But in an action of replevin in the *detinet*, the general issue was tendered by the plea of *non detinet*, and that plea at common law put in issue, as well the plaintiff's property in the goods as the detention thereof by the defendant. And it was provided in the Revised Statutes (2 R. S. 529, § 40), that "when the action is founded on the wrongful detention of the goods, and the original taking is not complained of, the plea of the general issue shall be, that the defendant does not detain the goods and chattels specified in the declaration, or any part thereof, in manner and form as therein alleged; and such plea shall put in issue, not only the detention of such goods and chattels, but also the property of the plaintiff therein." It was also provided by the Revised Statutes (2 R. S. 528, § 36), that the action of replevin might be founded upon both the wrongful taking and the detention of the property, in which case it was necessary that the declaration should allege the wrongful taking and also allege that the defendant continued to detain such property.

It cannot be doubted that this complaint contained all the allegations requisite to show a wrongful detention of the cars. By a liberal construction it might be held to be framed in a double aspect, both for the wrongful taking and the wrongful detention. Upon the trial there was no proof offered or given to show the wrongful taking of the cars, but the plaintiff simply gave proof to show the wrongful detention. Therefore, we think the action should have been treated as if it had been brought for a wrongful detention of the cars. It was necessary, therefore, for the plaintiff to show his title to the cars; and what it was necessary for him to show to maintain his action the defendant had the right to controvert by proof under its general denial. Its general denial put in issue, not only the wrongful detention, but plaintiff's title, and upon that

issue it had the right to show, not only title in itself, but title out of the plaintiff and in a stranger. The plaintiff, seeking to take property out of the possession of the defendant, was bound to show title in himself, and the defendant could defend itself by showing that he did not have title, and thus did not have the right to take from it the possession which it had acquired. (*Callwell v. Bruggerman*, 4 Minn. 270; *Jones v. Rahilly*, 16 id. 320; *Kennedy v. Shaw*, 38 Ind. 474; *Sparks v. Heritage*, 45 id. 66.) In *Kennedy v. Shaw*, decided under a system of pleading similar to our own, it is said: "Where the general denial is pleaded to a complaint in an action to recover the possession of personal property, the plaintiff must show his right to the possession of the property as against anybody else. He must recover upon the strength and validity of his own title and right to the possession of the property, and if the defendant can show the property, and right to the possession of the property to be in himself or in a third person, he may do so under the general denial and thus defeat the action." This broad and general statement of the rule, however, would not enable one who had taken property from the actual possession of another to justify the taking by the allegation and proof of title in a third person with which he did not connect himself.

There is nothing in the case of *Stowell v. Otis* (71 N. Y. 36) in conflict with these views; but regarding this as an action for the wrongful detention of the cars, that case is an authority for the views we have expressed.

Under our system of practice, and under every rational, logical system of pleading, the defendant must, under a general denial, be permitted to controvert by evidence everything which the plaintiff is bound in the first instance to prove to make out his cause of action. (*Robinson v. Frost*, 14 Barb. 536; *McKyring v. Bull*, 16 N. Y. 297; *Wheeler v. Billings*, 38 id. 263; *Weaver v. Barden*, 49 id. 286.)

The denial in this answer of "each and every allegation of the complaint not hereinabove admitted or controverted," is a good general denial. What had been before admitted and controverted was clearly specified, and hence there was no doubt or

Statement of case.

confusion as to the application of this general denial; and this answer is not, therefore, condemned by the decision in *Clark v. Dillon* (97 N. Y. 370).

The appellant also makes a point as to the statute of limitations. Upon the new trial it should be permitted to prove all the facts bearing upon that defense, and then the application of the law to the facts will probably not be difficult. We do not deem it our duty to say more about it now.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur, except DANFORTH, J., not voting.

Judgment reversed.

GEORGE S. CAHILL, Respondent, v. GEORGE J. SMITH, Appellant.

Plaintiff purchased of defendant certain personal property covered by a chattel mortgage; the latter gave a bill of sale by which he covenanted "to warrant and defend the sale," and a writing by which he certified that the chattel mortgage would thereafter be paid by him; not having been paid it was foreclosed and the property was purchased by N. for \$700, the amount due on the mortgage. N. claimed the property, and plaintiff paid him \$1,000 therefor. In an action to recover damages for the breach of defendant's agreements plaintiff recovered the amount due on the mortgage. *Held* no error; that no actual eviction was necessary to sustain the action; that as he could not withhold the property from the purchaser without becoming a wrong-doer, his submission, although peaceable, was not voluntary.

(Argued January 21, 1886; decided February 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 11, 1883, which affirmed a judgment in favor of the plaintiff, entered on a verdict.

The nature of the action and the material facts are stated in the opinion.

Opinion of the Court, per DANFORTH, J.

N. C. Moak for appellant. Upon a warrant in a bill of sale of personal property there must be an actual eviction before the vendor can be held. (*Bordwell v. Collie*, 1 Lana. 141, 144, 146; 45 N. Y. 494, 495; *Greenvault v. Davis*, 4 Hill, 643; *St. John v. Palmer*, 5 id. 599, 602, 603; *Atkins v. Hosley*, 3 T. & C. 322, 324.) Eviction is an actual expulsion. (*Jackson v. Cole*, 4 Cow. 485; *Fellows v. Lyon*, 6 N. Y. Weekly Dig. 424; *Case v. Hall*, 24 Wend. 102.)

M. F. McGoldrick for respondent. Maguire's hostile assertion of his paramount title was an eviction and a breach of defendant's covenant. (*Bordwell v. Collie*, 45 N. Y. 495.) A purchase of paramount title hostilely asserted is a breach of the covenant of warranty. (Rawle on Covenants for Title, 278; *Hunt v. Amidon*, 4 Hill, 345; *Bragelman v. Dane*, 69 N. Y. 69.)

DANFORTH, J. On the 6th of January, 1882, a mortgage was executed to one McElroy, upon certain store fixtures. Afterward the defendant sold them to the plaintiff at the price of \$1,800, giving a written bill of sale, dated June 23, 1882, with a covenant "to warrant and defend the sale" thereof "against all and any person or persons," and a writing dated June 24, 1882, acknowledging payment of "the sum of \$1,800, the consideration named in the bill of sale," and also certifying that the chattel mortgage above referred to "will hereafter be satisfied by me." These papers were signed by the defendant.

In December, 1883, the debt being unpaid, the mortgage was foreclosed by its then owner, and the mortgaged property sold to one Norton for \$700, the amount due on the mortgage. He claimed the property, and to retain it the plaintiff paid him \$1,000. It appeared that Norton did not in fact remove the fixtures, and that the plaintiff's business, in which they were used, was not interrupted.

This action was for damages by reason of the breach of defendant's agreement. The facts were not disputed, and the trial judge held the plaintiff entitled to recover, but only \$700, the

Statement of case.

amount due on the mortgage, and for that sum directed a verdict in his favor. Upon the trial the defendant claimed among other things that no actual eviction had been proven, and its necessity presents the only point made in support of this appeal.

We think it is without merit. The title to which the plaintiff yielded was paramount to that acquired by him from the defendant, and he was not required by violence to resist the lawful demand of the owner. He could not withhold the property without becoming a wrong-doer, and his submission, therefore, although peaceable, was not voluntary. Under such circumstances, the right of a purchaser to redress for breach of a warranty of title is well settled. (*Bordwell v. Collie*, 45 N. Y. 494; *McGiffin v. Baird*, 62 id. 329.) In the present case, however, the plaintiff was not only deprived of his title by the enforcement of a valid prior mortgage, and sale under it, but regained a right to its possession only by paying money upon an obligation which the defendant had expressly agreed to satisfy, but did not. There was a breach of both agreements, and the plaintiff was justly entitled to recover.

The judgment should be affirmed.

All concur.

Judgment affirmed.

CHARLES STEWART et al., Appellants, v. WILLIAM D. MARVEL,
Respondent.

101	857
164	191

Defendant contracted to sell plaintiff ten car-loads of iron—" (C) Blooms"—to be delivered "as fast as they may be produced, small enough to meet the usual requirements of measure." Five car-loads were delivered. In an action to recover damages for non-delivery of the residue, held, the contract required not simply that the blooms should be delivered as fast as they were actually produced, but that they should be produced in the ordinary operations of defendant's forge, with reasonable diligence and by reasonable and proper efforts, and defendant was not authorized to stop the production from motives of economy or convenience.

Statement of case.

Evidence was offered on the part of plaintiffs and received under objection, that defendant stated, at the time the contract was made, that he could produce a car-load of blooms for delivery every ten days. *Held* no error.

(Argued December 10, 1885; decided February 9, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made at the September term, 1883, which reversed a judgment in favor of plaintiffs, entered upon the report of a referee.

This action was brought to recover damages for an alleged breach of a contract. The contract and the material facts are set forth in the opinion.

Walter D. Edmonds for appellants. Where an indefinite time is set for performance of the contract performance must be had within a reasonable time, to be determined by reference to defendant's capacity and ability to produce, without interfering with the usual and regular course of business or production. (*New Haven Co. v. Quintard*, 6 Abb. Pr. [N. S.] 128; *Cocker v. Franklin Co.*, 3 Sumn. 530; *Tufts v. McClure*, 40 Iowa, 317; *Atwood v. Cobb*, 16 Pick. 237.) In the construction of a written instrument, so worded that it is ambiguous, oral evidence to explain the meaning attributed to the words by the parties is not only competent but indispensable. (*Almgren v. Duluth*, 5 N. Y. 28; *Ely v. Adams*, 19 Johns. 317; *French v. Carhart*, 1 Comst. 102; *Tochman v. Brown*, 33 N. Y. Super. Ct. [J. & S.] 409; *Grey v. Harper*, 1 Story, 588; *MacDonald v. Longbottom*, 1 El. & El. 981, 985, 987; *Thorington v. Smith*, 8 Wall. 1; *Stoops v. Smith*, 100 Mass. 63; *Bradley Steam Packet Co.*, 13 Pet. 94; *Duncan v. Topham*, 8 id. 225; *Anderson v. R., W. & O. R. R. Co.*, 56 N. Y. 341; *Proctor v. Hartigan*, 2 N. E. Rep'r, 99; *Herring v. Boston Iron Co.*, 1 Gray, 134.) Every breach of contract implies damages, and the measure of damages in such cases as this at bar is the difference between the contract and the market-prices of the undelivered article, or, in the absence of the latter in the market, the market-prices of the nearest sub-

Statement of case.

stitute that can be found. (*Booth v. Rolling Mill Co.*, 60 N. Y. 492; Sedg. on Meas. of Dam. 557, note; *Dana v. Fiedler*, 12 N. Y. 70; *Hinde v. Liddle*, L. R., 10 Q. B. 265.) Plaintiffs' letters of March ninth and twelfth, to the company did, in effect, extend time of delivery until March 28, 1880. But they did so conditionally only; there is nothing in the evidence to show that either defendant or his agent, the company, ever acted in any way on this proffered extension. The letters, therefore, were of non-effect. (*Bacon v. Cobb*, 45 Ill. 77; *Collins v. Baumgardner*, 52 Penn. St. 461; *Frus v. Rider*, 24 N. Y. 367; Bish. on Cont., § 647; *Proctor v. Hartigan*, 2 N. R. 99; *Almgren v. Dulith*, 1 Seld. 28; 1 Ell. & Ell. 981-987; *Stoop v. Smith*, 100 Mass. 63; *Herring v. Boston Iron Co.*, 1 Gray, 134.) In construing the clause "say as fast as they may be produced" the rule *contra proferentum* applies. (*Ripley v. Larmouth*, 56 Barb. 25; *Marvin v. Stone*, 2 Cow. 806; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *White v. Hoyt*, 73 id. 511.) There has been a complete breach of the contract. (*New Haven Co. v. Quintard*, 6 Abb. Pr. [N. S.] 128; *Cocker v. Franklin Co.*, 3 Sumn. 530; *Tufts v. McClure*, 40 Iowa, 317; *Atwood v. Cobb*, 16 Pick. 237; *Waddell v. Peddick*, 13 Ired. [N. C.] 424.) The express words of the contract import an unqualified promise to deliver, and no scarcity of charcoal will excuse performance, when the reason defendant could not procure it was because they were unwilling to pay for it. (*Bingham v. Harmony*, 12 N. Y. 99; *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670; 29 Moak's Eng. Rep. 102; *Nelson v. Odiorne*, 45 N. Y. 493; *Tompkins v. Dudley*, 25 id. 272; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 id. 491.) The measure of plaintiffs' damage in this case is the difference between the contract price of iron, \$55 per ton, and the market-price of the same delivered at Easton, at the time when the contract iron should have been delivered, or the same market-price of the nearest substitute for the contract iron which could be found by plaintiffs, it being shown that there was no other iron like that called for by the contract to be had. (*Booth v. Rolling Mill Co.*, 60 N. Y. 492; Sedg. on Meas. of Dam. 557; *Dana v.*

Opinion *per Curiam*.

Fiedler, 12 N. Y. 240; *Champagne Case*, 3 Wall. 149; 1 Greenl. Ev., § 120; Abbott's Trial Ev. 309, 310, 312; *Hinde v. Liddle*, L. R., 10 Q. B. 265.)

David McClure for respondent. It was one of the incidents of business that interruptions in manufacture might occur, and if the interruption was not caused by the acts of the defendant or his successor to evade the contract, there is no breach. (*Del., Lack. & West. R. R. Co. v. Browne*, 58 N. Y. 573.) The testimony as to the conversation before or at the time of signing the contract, as to the delivery of a car-load every ten days or week, and upon which the referee based his finding and judgment, should not have been admitted. (*Johnson v. Oppenheim*, 55 N. Y. 293; *Eighmie v. Taylor*, 98 id. 288.) The party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. (*Hamilton v. McPherson*, 28 N. Y. 72.)

Per Curiam. On the 14th day of November, 1879, the defendant made a contract with the plaintiffs for the sale to them of iron, of which the following is a copy:

“NEW YORK, 14th November, 1879.

“STEWART & Co., Easton, Penn. :

“Sold you to-day ten car-loads of (C) blooms, at \$55 per ton, 2,240 pounds, delivered on cars at Easton, Penn., say as fast as they may be produced small enough to meet the usual requirements of measure, payable in thirty days from date of bills.

“WILLIAM D. MARVEL.”

Across the face was written: “Accepted. Stewart & Co.”

At the date of the contract the defendant was engaged in the production of the iron which he contracted to sell, but shortly thereafter his forge was sold to the Split Rock Forge and Mining Company, which assumed the performance of the contract on his part. Five car-loads of the iron were subsequently delivered to the plaintiffs, and this action was brought by them to recover damages for the non-delivery of the balance; and the

Opinion *per Curiam*.

real controversy between the parties is as to the proper construction of the contract.

The defendant contends that he was not obliged to deliver the blooms faster than they were actually produced in the operation of his forge, and that as he delivered all he actually produced, he was not in default. The contract should receive a reasonable construction so that, if its language will permit, both parties would be bound to perform in the manner which must have been contemplated by them when the contract was made. It could not have been intended that the plaintiffs should be bound to take the blooms whenever tendered by the defendant and yet he be at liberty to delay the delivery to suit his own convenience or interest indefinitely. It was plainly meant by the language, "as fast as they may be produced small enough," that the blooms should be produced in the ordinary operations of the forge with reasonable diligence, and by reasonable and proper efforts. The defendant had no right to omit to produce them from mere motives of economy or convenience, as he was under obligations to produce them.

The referee found that defendant's forge had the capacity to produce a car-load of blooms every ten days without interfering in any way with the regular running of the forge or its other contracts or business; that he delivered the last of the five car-loads on the 28th of January, 1880, and thereafter delivered no more down to the commencement of this action, in May, 1880, and he found that the usual operations and production of the forge were suspended and delayed during the months of February, March and April on the grounds of convenience or economy because of the high price of coal; and that after the twenty-eighth of February the defendant failed, neglected and refused to deliver to the plaintiff any more of the blooms. The evidence justified these findings, and they justify the conclusion of law that the defendant was responsible to the plaintiffs for the damages awarded.

Evidence was given by the plaintiffs, against the objection of the defendant, that the defendant stated, at the time the contract was made, that he could produce a car-load of blooms for deliv-

Statement of case.

ery to the plaintiffs every ten days. We think this evidence and other like evidence was competent for the purpose of showing the capacity of the defendant's forge, and how fast, by reasonable diligence and efforts, he could make delivery under his contract. We have carefully scrutinized other exceptions to rulings upon evidence to which our attention has been called, and do not think any of them require a reversal of the judgment entered upon the report of the referee. The opinion of the referee found in the case is quite satisfactory, and we also refer to that for a fuller statement of the reasons upon which we base our decision.

We are, therefore, of opinion that the order of the General Term should be reversed, and the judgment entered upon the report of the referee affirmed, with costs.

All concur, except EARL, DANFORTH and FINCH, JJ., dissenting.

Order reversed, and judgment affirmed.

MATTHEW C. UHRIG, Respondent, v. THE WILLIAMSBURG CITY FIRE INSURANCE COMPANY, Appellant.

Under an arbitration clause in a policy of fire insurance, it is the duty of the parties to the contract to act in good faith to accomplish the appraisal in the way provided; and if either acts in bad faith so as to defeat the real object of the clause, the other is absolved from compliance therewith; and so, when one arbitration fails from default of one of the parties, the other is not bound to enter into a new arbitration agreement.

Defendant issued a policy upon household furniture which contained a clause providing that in case of failure of the parties to agree as to the amount of a loss each should appoint one arbitrator, who should select an umpire to act with them in case of disagreement. A loss having occurred and the parties disagreeing, each selected an arbitrator in pursuance of the policy, who failed to agree. Plaintiff's testimony tended to show that he asked the arbitrator selected by defendant to agree with him in appointing an umpire, and asked defendant to select a new arbitrator; but they did not accede to his requests. Defendant's evidence tended to show that subsequently it made an offer to appoint a new arbitrator, and that the one selected by it offered to unite in selecting an

101	362
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Statement of case.

umpire, which offer plaintiff refused. Before these offers were made the fragments of the broken and damaged articles insured had been removed under order of the city authorities, so that an appraisal had, to a large extent, become impracticable. There was also some evidence tending to show that defendant was not acting in good faith to procure a speedy appraisal, but was using the clause in the policy to force a compromise. *Held*, that it was a question for the jury to determine whether there was any breach of the policy on the part of plaintiff; and that a refusal to submit the question to the jury was error.

(Argued January 20, 1886; decided February 9, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made December 11, 1883, which reversed a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on trial. (Reported below, 31 Hun, 98.)

This action was upon a policy of fire insurance, the particulars of which as well as the material facts are set forth in the opinion.

Albert G. McDonald for appellant. The condition to arbitrate the question of the amount of the loss and damage contained in this policy was a valid one, and the parties, might by express stipulation, make it a condition precedent like any other condition of the policy. (Wood on Fire Ins. 751; *Davenport v. Long Island Ins. Co.*, 10 Daly, 535; *Scott v. Avery*, 5 H. of L. Cas. 811; 8 Exch. 487; *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782; *Theodwen v. Holman*, 1 Hurlst. & Colt. 72; *President, etc., Delaware & Hudson Canal Co. v. Penn. Coal Co.*, 50 N. Y. 250, 266.)

Patrick Keady for respondent. Under all the circumstances it was clearly a question of fact for the jury to decide whether or not plaintiff had complied with the conditions of the policy, not a question of law for the court. (*Rehberg v. Mayor, etc.*, 91 N. Y. 137; *O'Brien v. Phoenix*, 76 id. 459; *Short v. Home Ins. Co.*, 90 id. 16; *Smith v. Mechanics & Traders' Ins. Co.*, 32 id. 399; *Wyncoop v. Niagara Ins. Co.*, 91 id. 478.) The agreement to arbitrate was collateral to the con-

Opinion of the Court, per EARL, J.

tract, and not a condition precedent which could be pleaded in bar of the action, and did not prevent plaintiff from bringing suit under the policy. (*Gibbs v. Continental Ins. Co.*, 13 Hun, 611; *Roper v. Linden*, 5 Jur. [N. S.] 491; 1 El. & El. 825; *Cook v. N. Y. C. R. R. Co.*, 3 Keyes, 476; *Dunham v. Troy Union R. R. Co.*, id. 543; *Colt v. Sixth Ave. R. R. Co.*, 49 N. Y. 671.) Plaintiff complied with the arbitration clause of the policy. (*Wyncoop v. Niagara Ins. Co.*, 91 N. Y. 478; *Wallace v. Ger. Am. Ins. Co.*, 4 McCrary's C. Ct. 123.) The award was not a condition precedent. (*Mark v. Nat. Fire Ins. Co.*, 24 Hun, 565; 91 N. Y. 663; *Leach v. Neptune Fire Ins. Co.*, 58 N. H. 21; Alb. Law Jour. 97; affirmed, *Leach v. Rep. Fire Ins. Co.*, 58 N. H. 245; *Pres't D. & H. Canal Co. v. Penn. Coal Co.*, 50 N. Y. 250.) Defendant did not comply with the arbitration condition of the policy. (*Wyncoop v. Niagara Ins. Co.*, 91 N. Y. 478.)

EARL, J. The plaintiff held a policy of insurance issued by the defendant upon certain personal property, and the property was destroyed by fire in July, 1882. The policy contained this clause: "The amount of sound value and of damage to the property may be determined by mutual agreement between the company and the assured; or failing to agree, the same shall then, at the written request of either party, be ascertained by an appraisal of each article of personal property, or by an estimate in detail of a building, by competent and impartial appraisers, one to be selected by each party, and the two so chosen shall first select an umpire to act with them in case of their disagreement; and if the said appraisers fail to agree they shall refer the differences to such umpire; and the award of any two in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not decide as to the validity of the contract or any other question except the amount of such loss or damage." Among other things in its answer, the defendant alleged that the plaintiff and defendant failed to agree upon the damage occasioned by the fire, and that on or about the 11th day of August, 1882, it served

Opinion of the Court, per EARL, J.

upon plaintiff a written request that the amount of damages sustained by him from the fire should be ascertained and determined by appraisers to be selected as required by the policy, and offered to select and appoint an appraiser for that purpose, on its behalf, and that he wholly refused to submit to such appraisal or appoint an appraiser for that purpose, and refused to comply with the terms and conditions of the policy in that respect. Upon the trial it appeared that the fire occurred on Sunday, the thirtieth of July; that on the next day the plaintiff notified the defendant of the fire and of the loss; that on the second day of August it requested an arbitration under the policy, and he assented; that thereupon he selected one De Andreau, and the defendant one Magnus as arbitrators, and an agreement in writing was executed by the parties submitting the appraisal of the damages to the arbitrators thus selected, and that the arbitrators failed to agree. The defendant gave evidence tending to show that it subsequently made plaintiff an offer to appoint a new arbitrator in the place of Magnus, and also that Magnus offered to unite with De Andreau in selecting an umpire, but that the plaintiff and De Andreau refused. The plaintiff, as a witness in his own behalf, gave evidence tending to show that, after the arbitrators failed to agree, he requested the defendant to appoint another arbitrator, and that he asked Magnus to agree with De Andreau in appointing an umpire, and they did not accede to his requests.

Under the arbitration clause, it was the duty of each party to act in good faith to accomplish the appraisement in the way provided in the policy, and if either party acted in bad faith so as to defeat the real object of the clause, it absolved the other party from compliance therewith; and if either party refused to go on with the arbitration, or to complete it, or to procure the appointment of an umpire so that there could be an agreement upon an appraisal, the other party was absolved. A claimant under such a policy cannot be tied up forever without his fault and against his will by an ineffectual arbitration. The evidence tended to show that the defendant failed and refused to go on with that arbitration. In the meantime, partly under

the orders of the city authorities, the offensive debris and broken and injured articles about the plaintiff's premises had to a great extent been removed, so that an appraisal had become to a large extent impractical. There was some evidence tending to show, and from which a jury might have inferred, that the defendant was not acting in good faith to procure a speedy appraisal, and was interposing this clause in the policy for the purpose of forcing a compromise from the plaintiff. Upon all the evidence, it was a question of fact for the jury to determine whether there was any breach of this clause in the policy on the part of the plaintiff, and the case should thus have been submitted to them.

After its refusal or neglect to go on with the first arbitration which had been agreed upon, on the tenth of August thereafter, the defendant served upon the plaintiff another written request to arbitrate, and offered to select a person to appraise the damages on its part. To this offer plaintiff refused to accede, and there was evidence, in the conduct of the defendant in reference to the arbitration first agreed upon and in the removal of the property damaged, tending to show that the refusal was justifiable. The defendant in its answer did not set up as a bar to the action the pending arbitration or any conduct of the plaintiff in reference thereto, but simply alleged that the plaintiff upon request refused to enter into an arbitration as provided in the policy. This allegation was untrue. The plaintiff had entered into an arbitration and was not bound to enter into a new one while that was pending, and if that one failed from the fault of the defendant, he had discharged his whole duty under the arbitration clause and was not bound to enter into a new arbitration agreement. The plaintiff having once consented to arbitrate, if the arbitration failed and came to an end, from the fault of the defendant, the arbitration clause could not stand in the way of this action.

The order should be affirmed, and judgment absolute entered against the defendant, with costs.

All concur.

Order affirmed and judgment accordingly.

Statement of case.

WILLIAM PEASE, Respondent, v. THE DELAWARE, LACKAWANNA
AND WESTERN RAILROAD COMPANY, Appellant.

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Where a passenger on a railroad, by an illegal refusal to pay fare, renders it the duty of the conductor in enforcing the reasonable rules and regulations of the company to eject him from the cars, and the refusal and resistance of the passenger continues until after force has been required and applied to remove him, he cannot, by offering to pay fare, make the continuance of the process of expulsion unlawful; and, although he is ejected, after an offer to pay fare, at a place where the train ordinarily stops and receives passengers, this does not render the railroad company liable.

A carrier of passengers is not required unconditionally to accept all persons who offer themselves for transportation and tender fare; he may lawfully decline to receive or carry those who refuse to conform to his reasonable rules, after knowledge of the same, or may after such refusal lawfully eject those who have been received.

Plaintiff boarded a train on defendant's road; when the conductor in collecting fares reached him he presented an invalid ticket, which the conductor refused to accept, and demanded fare. This plaintiff refused to pay. The conductor informed him that he would be obliged to put him off unless he paid. He replied that he would sue the company if he was put off. This occurred as the train reached a place where the track was crossed by another railroad at grade, and where, in compliance with the statute, trains on defendant's road stopped for a moment, and where passengers were in the habit of getting on and off. The conductor called for assistance, a brakeman and baggageman came and began the removal. Plaintiff resisted and continued the struggle without cessation until he was landed on the track. When he reached the car door and again while on the platform he stated he would pay the fare. The court charged that if the train had stopped at a station and before it started again plaintiff offered to pay his fare, any subsequent effort to remove him was unlawful and rendered defendant liable for damages. *Held*, error. *O'Brien v. N. Y. C. & H. R. R. Co.* (80 N. Y. 236), distinguished. *Pease v. D., L. & W. R. R. Co.* (11 Daly, 350).

(Argued January 21, 1886; decided February 9, 1886.)

Appeal from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made January 21, 1884, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 11 Daly, 350.)

This action was brought to recover damages for an alleged

Opinion of the Court, per RUGER, Ch. J.

unlawful and forcible eviction by defendant's employes of plaintiff from a train on defendant's road.

The material facts are stated in the opinion.

Hamilton Odell for appellant. Plaintiff being a non-resident, and defendant a foreign corporation, and the cause of action an alleged assault and battery on plaintiff, committed in New Jersey, the Court of Common Pleas had no jurisdiction. (*Harriott v. N. J. R. R. & T. Co.*, 2 Hilt. 232; 49 N. Y. 308; Code of Civ. Pro., § 1780; 10 Daly, 459; *Dudley v. Mayhew*, 3 N. Y. 12; *Beach v. Nixon*, 9 id. 35; *Risley v. Phenix Bk.*, 83 id. 337; *McCormick v. Penn. R. R. Co.*, 49 id. 308.) The relation of passenger and carrier is founded on contract, and a refusal by the former to pay lawful fare releases the latter from all obligation and renders the passenger a trespasser and liable to ejection by necessary force. (*Jeffersonville Co. v. Rogers*, 28 Ind. 1; *Hoffauer v. D. & N. W. Co.*, 52 Iowa, 342; *O'Brien v. B. & W. Co.*, 15 Gray, 24; *People v. Jillion*, 3 Park. Cr. 234; *Stone v. C. & N. W. Co.*, 47 Iowa, 82; *Hibbard v. N. Y. & E. Co.*, 15 N. Y. 457; *Louisville, etc., Co. v. Harris*, 9 La. 180; *State v. Campbell*, 32 N. J. L. 309; *Nelson v. L. I. Co.*, 7 Hun, 140; *Hall v. M. & C. Co.*, 9 A. & E. R. R. Cas. 348; *T. & P. Co. v. Casey*, 52 Texas, 112; *Swan v. M. & L. Co.*, 132 Mass. 110.)

Thomas M. North for respondent. Plaintiff having tendered his fare before his ejection was accomplished, it should have been accepted, and defendant is liable for not accepting it. (*O'Brien v. N. Y. C. & H. R. R. Co.*, 80 N. Y. 236; *Guy v. N. Y. & O. W. R. Co.*, 30 Hun, 399; *Nelson v. L. I. R. R. Co.*, 7 id. 140; *Lynch v. Met. El. Ry. Co.*, 90 N. Y. 77.) A common carrier is liable to a passenger for an assault and battery by its servant, however malicious and unauthorized. (*Stewart v. B'klyn, etc., R. R. Co.*, 90 N. Y. 588; *Jackson v. Second Ave. R. R. Co.*, 47 id. 274.)

RUGER, Ch. J. The court charged the jury as matter of law, that if the train bearing the plaintiff had stopped at a station,

Opinion of the Court, per RUGER, Ch. J.

and before it started again he offered to pay his fare, that any subsequent act of the defendant committed in the effort to expel him was unlawful, and rendered it liable for damages occurring therefrom. To this charge there was an exception.

We think this direction was erroneous. The facts taken in their most favorable aspect for him, showed that the plaintiff boarded the defendant's train at Hoboken, intending to ride to Montclair. When the conductor reached him in the process of collecting fare, the plaintiff exhibited a ticket purporting to be good for a passage on defendant's cars from Montclair to Hoboken. This the conductor refused to accept, and requested the plaintiff to pay his fare. He refused and demanded a passage on the ticket. The conductor told him he should be obliged to put him off unless he paid his fare. The plaintiff then replied, "I will sue the company if you put me off." An issue was thus deliberately and intelligently made between the parties. The conductor called for assistance, and a brakeman and baggageman appeared and began the removal. The plaintiff resisted with force the effort to remove him, and continued the struggle without cessation from his seat until he was finally landed on the track outside the car.

At the time the plaintiff reached the car door, and while he was near it on the platform, he stated to those engaged in ejecting him that he did not want to be put off, and would pay his fare; but notwithstanding this offer the expulsion continued and plaintiff was ejected.

It is not disputed but that the ticket tendered, was insufficient to entitle the plaintiff to a ride from Hoboken to Montclair, nor but that the conductor was justified in ejecting him from the cars for non-payment of fare; but it is claimed that the moment the plaintiff declared his willingness to pay fare, the right of the defendant to continue the expulsion *eo instanti* ceased, and the right of the plaintiff as a proposed contractor with the corporation commenced.

This claim is founded upon the assumption that an individual who is in the process of being lawfully and necessarily ejected by force, from the cars in pursuance of statutory authority, stands

Opinion of the Court, per RUGER, Ch. J.

in the same relation to the carrier as an unobjectionable person tendering fare, and asking passage on its trains from a regular station.

It was held in *O'Brien v. N. Y. C. & H. R. R. Co.* (80 N. Y. 236), that if the stoppage of a train is rendered necessary to expel a passenger therefrom, for a fractious refusal to pay fare, that he does not by offering to pay it before expulsion, become entitled to continue the trip. This authority is quite conclusive upon the question, that a mere offer to pay fare under all circumstances does not establish new relations between the passenger and carrier, and entitle the passenger to continue his passage. *Hibbard v. N. Y. & E. R. R. Co.* (15 N. Y. 455, 460) is to the same effect. There the passenger had bought a ticket which entitled him to transportation from Hornellsville to Scio. After having once shown his ticket to the conductor, he refused to show it again, upon a second request, at a point between the commencement and terminus of his journey. After the train had been stopped for the purpose of expelling him therefrom for such refusal he exhibited his ticket, but the defendant put him off the train notwithstanding. It was held that this expulsion was justifiable because of the refusal of the passenger to comply with the reasonable requirements of the carrier.

Although it must be assumed upon the evidence in this case that the transaction in question occurred at a stopping place, where passengers had the right to get on and off the cars, yet it should be borne in mind that it was not a regular station, and the ordinary time of stoppage at that place was momentary and was required by law as a measure of precaution in cases wherever railroads crossed each other at grade. Such a transaction as that in question, would necessarily cause a detention of a train for a longer or shorter period, according to the circumstances, and the proof in this case shows the detention to have been three minutes.

When a passenger by an illegal refusal to pay fare has rendered it the duty of a conductor, in enforcing the reasonable rules and regulations of the company, to eject him from the cars, and the refusal and resistance of the passenger continues

until after force has been required and applied, to enforce such rule, we think he cannot make the continuance of the process of expulsion unlawful, by an offer to pay fare during its progress.

Having invited an appeal to force, the passenger cannot at his option, reserve the privilege of shielding himself from its application, by invoking the protection of a contract, the implied conditions of which he has violated. The trial of his right, in a manner which he has deliberately selected, cannot be arrested by him when its course is not proceeding to his satisfaction, so as to make its continuance by the other party unlawful.

The contention of the respondent proceeds upon the assumption that any person by tendering fare, has established a right to passage upon the trains of a carrier of passengers. This, we think, is not correct. Such a carrier is not required unconditionally to accept all persons who offer themselves for transportation, and tender fare. It has been held that they may lawfully decline to receive or carry those who refuse, after knowledge of the same, to conform to the reasonable rules of the company, or to pay their fare, or purchase tickets before entering the cars, and that it may lawfully eject from the train persons committing these offenses. (2 Rorer on Railroads, 958 *et seq.*)

In such a case as this, we think a passenger who resists the lawful requirement of the company, to the extent of provoking a breach of the peace, and the exhibition of violence in the presence of other passengers cannot, as matter of law, demand a passage upon the train where such an exhibition has been made.

A railroad company has the right, and it is its duty to enforce order in its cars, and to eject therefrom those who by indecent or obscene language, or by violent and boisterous behavior, cause danger, discomfort or annoyance to other passengers; and in the exercise of this right, the officers of the company must determine as to the propriety of their action, being responsible for the reasonable exercise of their discretion.

Opinion of the Court, per RUGER, Ch. J.

(1 Redf. on Railways, 91, 92, 105; *People v. Jilison*, 3 Park. Cr. 234; *People v. Caryl*, id. 326; Rorer on Railroads, 958, 959.)

It would be quite absurd to say, that one whose unlawful conduct had provoked a breach of the peace, should be able to throw upon his adversaries the blame of the affray, by simply withdrawing his challenge, and declaring his change of mind. He has provoked an unlawful affray and his rights are to be determined by the rules which apply to persons thus engaged. The act of expulsion is made legal by his unlawful refusal to pay fare, and any necessary force required to completely execute it, would be justifiable.

It is, under the circumstances of this case, immaterial that this affray occurred at a station, as that fact is important only in considering the rights of parties with reference to new relations, or as bearing on the right of the carrier to determine the time and mode of expulsion. The case of O'Brien holds that when an oral controversy as to the payment of fares arises at or before arrival at a regular station, and while at such station, and before force has been applied to effect the expulsion, the passenger offers unqualifiedly to pay his fare, and tenders the money therefor, that his subsequent expulsion under such circumstances would be unlawful, and we think decides nothing farther than this.

In this case it may also well be said that the measures rendered necessary by the conduct of the plaintiff would probably involve the detention of the train and the consequences deprecated in the *Hibbard Case* and bring it within the letter of the rule there stated.

The judgment should be reversed and a new trial ordered, with costs to abide the result.

All concur, except ANDREWS and DANFORTH, JJ., dissenting.
Judgment reversed.

Statement of case.

JOHN B. CORNELL et al., Appellants, v. JOHN ROACH et al.,
Respondents.

The duty imposed upon manufacturing corporations by the General Manufacturing Act (§ 12, chap. 40, Laws 1848), of making and filing an annual report is a corporate duty, to be discharged by making a report, signed by the president and a majority of the trustees; it is not a duty cast upon the trustees as such, or in their individual capacity.

In an action against trustees of a manufacturing corporation to recover a debt of the corporation because of a failure to make and file a report for the year 1877, four of the defendants joined in an answer, one count of which averred that said defendants failed to make a report for the year 1873, and for each year thereafter, and that more than three years had elapsed since any penalty or claim arose against them in favor of plaintiff. The number of trustees of the corporation was not alleged. On demurrer to this count, *held*, that it was defective, in that it did not aver that defendants were trustees in 1873, or thereafter, previous to 1877; nor did it allege any default by the corporation prior to 1877, as if it was to be assumed that defendants were trustees, still it did not appear and could not be assumed that they constituted a majority of the board, and the corporate duty might have been performed without their joining in the report.

Where a debt against such a corporation owned by a trustee thereof is assigned by him absolutely for value, the assignee, on a default in making and filing a report subsequently occurring, may proceed against trustees to recover the debt, although the assignor continues to be a trustee up to the time of the default.

(Argued January 21, 1886; decided February 9, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 25, 1883, which affirmed a judgment in favor of the defendants answering, entered upon an order overruling a demurrer to two counts of the answer, and dismissing the complaint.

This action was brought by plaintiff as creditor of the *Ætna Iron Works*, a corporation organized under the General Manufacturing Act, to recover against defendants, as trustees of the corporation, the amount of its indebtedness to them, because

101	378
131	146

101	378
134	208

101	378
164	283

Statement of case.

of failure on its part to make and file an annual report for the year 1877.

The indebtedness alleged was the amount of certain bonds issued by the company. Four of the defendants joined in the answer, two counts of which were as follows:

"For a fifth and separate defense these defendants allege that the bonds described in the complaint herein, if valid, were issued to and held by their co-defendant, Birdsall Cornell, prior to said bonds having come into the possession of the plaintiffs; that said Birdsall Cornell had no right nor valid claim under the statute, chapter 40 of the Laws of 1848, and its amendments, nor otherwise, against these defendants, his co-trustees, founded upon said bonds or upon any indebtedness, if any, of said corporation, to him for any failure to make or publish or file any annual report since January 1, 1877, or since any time, and that the plaintiffs never became possessed of, nor entitled to, any such claim, right or penalty founded upon said bonds, by assignment, or in any way."

"For a ninth and separate defense these defendants allege that these defendants failed to file any annual report of said corporation within twenty days after the 1st day of January, 1873, and that they filed none in January, 1874, nor in 1875, and none in January, 1876, and that they have filed no report whatever since the 1st day of January, 1873, and that before this action was begun, which was on or about December 22, 1879, more than three years had elapsed from the time when any penalty or claim whatsoever, if any, had arisen in plaintiffs' favor against the defendants herein."

To these two counts plaintiffs demurred.

Tallmadge W. Foster for appellants. Plaintiffs upon the transfer of the bonds to them became creditors of the *Ætna Iron Works*, and the assignment to them of a debt owing by the corporation carried with it all rights and remedies for its recovery and collection. (*Bolen v. Crosby*, 49 N. Y. 183-187.) For any default in filing the report occurring prior to the transfer of the bonds, the then trustees would not be liable if plaintiffs'

assignor were a trustee at the time of such default. (*Knox v. Baldwin*, 80 N. Y. 610; *Briggs v. Easterly*, 62 Barb. 51; *Estes v. Burns*, 37 Supr. Ct. 1; *Bronson v. Dimock*, 4 Hun, 614.) A cause of action arises upon each default under the statute, and the statute of limitations begins to run as to each default from the time of such default. (*Nemmons v. Tappan*, 2 Sweeney, 652; *Anderson v. Speers*, 8 Abb. N. C. 382.) The general purpose of section 12 of the act of 1848 (Chap. 40) is to provide authentic information to creditors of the company and those dealing with it of its financial condition at fixed recurring periods, so as to enable them to act intelligently. (*Cameron v. Seaman*, 69 N. Y. 401; *Bruce v. Plutt*, 80 id. 386.)

George W. Van Siclen for respondents. The right to sue defendants for a default under section 12 of the act of 1848 (Chap. 40) did not revive and continue upon each subsequent and successive neglect to file a report after the first, but was exhausted by a single default, and the statute commenced to run at that time. (*Losee v. Bullard*, 79 N. Y. 404; *Trinity Church v. Vanderbilt*, 98 id. 170.) As plaintiffs' assignor was himself a trustee he had no right of action for a penalty against his co-trustees and could assign none. (*Knox v. Baldwin*, 80 N. Y. 610.)

ANDREWS, J. The duty imposed upon manufacturing corporations by the twelfth section of the act of 1848 (Chap. 40), to make a report, is a corporate duty, to be discharged by making a report signed by the president and a majority of the trustees. The duty is not cast upon the trustees, either as such, or in their individual capacity. The section makes it the duty of the company to make the report, and provides for the manner of performing it. The act, as amended in 1860, provides that such corporations shall have not less than three nor more than thirteen trustees. It is evident therefore that a report made by a corporation organized since the act of 1860, having the full number of trustees thereby authorized, if signed by seven trustees, is, in that respect a valid report. So also of a corpo-

ration previously organized which under the authority of the act of 1860 has increased its number of trustees to thirteen. The original act required that there should be not less than three, nor more than nine trustees. (§ 3.) A corporation previously organized, which has not availed itself of the act of 1860, if there were nine trustees, could make a report signed by five trustees. It does not appear whether the *Ætna Iron Works* was organized before or after 1860, or of what number the trustees consist. The ninth defense alleges that the defendants, comprising four persons, failed to file a report in 1873, and in each year thereafter, including 1876, and that more than three years had elapsed prior to the commencement of the action, after the penalty for not filing the report, if any, had been incurred. This defense was demurred to on the ground that it was insufficient in law. The complaint counts upon a failure of the *Ætna Iron Works Company* to file a report in 1877. The ninth defense was intended doubtless to set up the statute of limitations. But it neither alleges that the four defendants were trustees at the time of the alleged defaults, nor that there was any default by the *company* in performing the corporate duty of making a report. If it could be held that it is impliedly averred that the defendants were trustees prior to 1873 (*Marie v. Garrison*, 83 N. Y. 14), the other objection taken cannot in this way be obviated. The allegation that the defendants failed to make or file a report in 1873, and the following years prior to 1877, may be true, and yet the corporate duty of making a report may have been performed by a report made and signed by a majority of the trustees; since if there were nine or more trustees, a report signed by the trustees other than the defendants, would have been a compliance with the statute. There being no averment as to the number of trustees, it cannot be assumed that the defendants comprised a majority of the board. We think, therefore, the demurrer to the ninth defense was well taken.

The fifth defense does not allege that the title of the plaintiffs to the bonds, as assignees of Birdsall Cornell, one of the trustees, accrued subsequent to the default alleged, or that the assignment was not absolute. It is not necessary, therefore, to consider

Statement of case.

whether if the bonds were assigned as collateral security only, a default of the company to make a report occurring subsequently to the assignment, would be available to the assignee. It cannot however be doubted, that when a debt against a corporation, owned by a trustee, is assigned by him absolutely for value, the assignee, on a default by the company subsequently occurring to make a report, may proceed under the twelfth section although the assignor continued to be a trustee up to the time of the default. The fifth defense was defective irrespective of any other question for the omission to aver that this default occurred prior to the accruing of the plaintiffs' title. It results, therefore that the judgment overruling the demurrer should be reversed, and judgment entered for the plaintiffs, with liberty to the defendants to answer within twenty days on payment of costs.

All concur.

Judgment accordingly.

BIANCA HEXAMER, Appellant, v. WILLIAM H. WEBB,
Respondent.

101	377
162	66

In order to establish the liability of one person for an injury caused by the negligence of another, it is not enough to show that the latter was at the time acting under an employment by the former; it must be shown in addition that the employment created the relation of master and servant.

Defendant employed one B., who was engaged in "the roofing and cornice business," to make some repairs to the cornice of his hotel, in the city of New York. The defect was pointed out, but no price or plan for doing the work was specified; the method of repair and the means to be employed being left entirely to the judgment of B., who agreed simply to remedy the defect. In doing the work the employes of B. suspended a ladder from the roof of the hotel, upon which planks were placed to serve as a scaffold. A gust of wind caused one of these planks to fall; it struck and injured plaintiff, who was passing at the time. Defendant was not in the city while the repairs were in progress, and had no knowledge of the manner in which the work was being done. In an action to recover damages for alleged negligence causing the injury,

Statement of case.

held, that the complaint was properly dismissed; that the relation of master and servant did not exist between the defendant and B., but the latter was an independent contractor, and the men employed were his, not defendant's servants; also that it was immaterial that the work was charged for by the day.

It appeared that the hotel was separated from the sidewalk by an area fifteen feet wide. *Held*, that the scaffold thus suspended was not a nuisance, nor was it violative of a city ordinance prohibiting the hanging of any goods or other things in front of a building at a greater distance than one foot.

It seems the ordinance does not apply to a temporary structure erected for the purpose of repairing a building.

(Argued January 23, 1886; decided February 9, 1886.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made January 14, 1884, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial.

The action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

It appeared that some work was being done upon the cornices of defendant's hotel, in the city of New York, by men in the employ of one Burford, who carried on "the roofing and cornice business." A ladder was suspended from the roof, upon which were two planks fastened to the ladder by ropes; this furnished a scaffold for the workmen, which was shifted from place to place as the work progressed. The wind was blowing hard and cut the ropes by striking the scaffold against the building. As they were moving the scaffold a gust of wind raised the planks and they fell to the ground; one of them struck upon the sidewalk, bounded and hit the plaintiff, injuring her seriously. Mr. Burford was called as a witness for plaintiff. He testified that he sent the men to do the work at the request of the defendant; that the latter spoke to him two or three times about doing something to keep the pigeons away from the eaves, as they were becoming a nuisance and were injuring the building. The witness then testified, "Finally, he told me he was going in the country, something must be done; I told him to make himself

Statement of case.

easy, I would do the best I could for it, and it was a very difficult place to get at, but I would do the best I could for him, do something." This was all the contract. The witness sent in a bill after the work was finished, charging by the day for his workmen, and for the materials used.

Further facts are stated in the opinion.

I. T. Williams for appellant. The workmen, including Burford, were defendant's servants. (S. & R. on Neg., §§ 70, 71, 76, 77, 98; *Chicago v. Loney*, 6 Ill. 383; *Arc. F. Ins. Co. v. Austin*, 69 N. Y. 470; *Blake v. Ferris*, 5 id. 48; *Pack v. Mayor, etc.*, 8 id. 222; *King v. N. Y. C. R. R. Co.*, 66 id. 181; *Town of Piermont v. Loveless*, 72 id. 211; *Murray v. Curry*, L. R., 6 C. P. 24; *Cincinnati v. Stone*, 5 Ohio St. 33; *St. Paul v. Sietz*, 3 Minn. 297; *Blake v. Thirst*, 2 Hurlst. & N. 29; *Morgan v. Bowman*, 22 Mo. 538; *Callahan v. B., etc., R. R. Co.*, 23 Iowa, 562.) The ladder or staging as suspended was a nuisance. (*Dygert v. Schenck*, 23 Wend. 446, 447; *Congreve v. Smith*, 18 N. Y. 79; *Clifford v. Dam*, 81 id. 53; *People, ex rel. Riley v. Mayor, etc.*, 49 How. 277; *Cook v. Vincent*, 4 Hun, 320; Whart. on Neg., § 187; *Robbins v. Chicago*, 4 Wall. 657; *Storrs v. City of Utica*, 17 N. Y. 104; Serg. & Rawle on Neg., §§ 83, 84; *Ellis v. Sheffield Gas Co.*, 2 El. & Bl. 767; *Congreve v. Morgan*, 5 Duer, 495; *Creed v. Hartmann*, 29 N. Y. 591; Ordinances of N. Y. City, § 52.) The work to be done being intrinsically dangerous, defendant, having authorized it, will be regarded as the author of the mischief resulting from it. (2 Thomp. on Neg. 901; Moak's Underhill, 277; *Sulzbacker v. Dickie*, 51 How. Pr. 500; *Glickauf v. Manser*, 75 Ill. 289; *Leslie v. Pound*, 4 Taunt. 649; *Creed v. Hartmann*, 29 N. Y. 591; *Irvin v. Wood*, 4 Rob. 138; 51 N. Y. 224; *Wood v. Luscomb*, 23 Wis. 287.) The injury complained of having resulted from an act it was absolutely necessary for Burford to do in order to accomplish the desired end, it may be said to have been directed to be done by defendant, and he is, therefore, liable for the injuries resulting. (*Water Co. v.*

Statement of case.

Ware, 16 Wall. 566; *McCafferty v. S. D. & P. M. R. R. Co.*, 61 N. Y. 178, 183.)

George S. Hamlin for respondent. There is no presumption of negligence in this case from the falling of the plank, because the facts in regard to its falling are all proved. (*Burrill on Circ. Ev.* 36; *Miller v. Ship Resolution*, 2 Dallas, 22; *Mullen v. St. John*, 57 N. Y. 571.) In order to establish negligence, it must be shown that there was an absence of that care which a man of ordinary prudence would have used under the circumstances. (*Shearm. & Redf. on Neg.*, §§ 4, 12; *Thomp. on Neg.* 1234; *Harvey v. Dunlop*, Lalor, 193; *Hatfield v. Roper*, 21 Wend. 615; *Brown v. Kendall*, 6 Cush. 392; *Lossee v. Buchanan*, 51 N. Y. 476; *Stewart v. Hawley*, 22 Barb. 619; *Culkins v. Barger*, 44 id. 424; 55 N. Y. 572.) In order to render a person liable for the negligence of others, it must appear affirmatively that the relation of master and servant existed. The burden is upon the plaintiff to show the existence of this relation. (*King v. N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 184.) The employment of Burford was the employment of a contractor and not of an agent or servant. (*Shearm. & Redf. on Neg.*, § 76; *Blake v. Ferris*, 5 N. Y. 58; *King v. N. Y. C. & H. R. R. R. Co.*, 66 id. 182; *Devlin v. Smith*, 89 id. 470; *Rapson v. Oubitt*, 9 Mees. & Wels. 710; *Earl v. Calkins*, 85 Penn. St. 240.) Burford was either a contractor or the agent of the defendant to hire the men and procure the materials for the performance of the work. (5 N. Y. 58.) The fact that no specific price was fixed for the work, and that, in his bill rendered, Burford charged the defendant for the services of his men by the day is immaterial. (*Shearm. & Redf. on Neg.*, § 77; *Corbin v. Am. Mills Co.*, 27 Conn. 280; *Sadler v. Henlock*, 4 El. & Bl. 570; *Harrison v. Collins*, 86 Penn. St. 53.) The persons actually engaged in the performance of the work were the servants of Burford, the contractor, and not of defendant. (*Quarman v. Burnett*, 6 Mees. & Wels. 509; *Kelly v. Mayor, etc.*, 11 N. Y. 436; *Park v. Mayor, etc.*, 8 id. 226; *Blake v. Ferris*, 5

Opinion of the Court, per MILLER, J.

id. 57; *McMullen v. Hoyt*, 2 Daly, 271; *Laugher v. Pointer*, 5 Barn. & Cres. 560; *Reedie v. London & Northwestern R. R. Co.*, 4 Exch. 244; *Hobbet v. Same*, id. 257.) The principle is the same in cases where the management of real estate is involved, as in other cases of negligence. (*King v. N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 181, 184, 185; *McCafferty v. S. D. & P. M. R. R. Co.*, 61 id. 178, 185; *Milligan v. Wedge*, 12 Ad. & Ell. 737; *Rapson v. Cubitt*, 9 Mees. & Wels. 713; *Reedie v. London, etc., R. R. Co.*, 4 Exch. 244; *Hobbit v. Same*, id. 257.) This action cannot be maintained on the ground of a nuisance created, maintained or authorized by the defendant. (*Dickinson v. Mayor, etc.*, 92 N. Y. 588; *Nolan v. King*, 97 id. 571; *Howard v. Robbins*, 1 Lans. 65; *Peckham v. Henderson*, 27 Barb. 207; *Griffith v. McCullum*, 46 id. 561; *Commonwealth v. Passmore*, 1 Serg. & Rawle, 219; *People v. Cunningham*, 1 Denio, 533; *Nolan v. King*, 97 N. Y. 571; *Davis v. Mayor, etc.*, 14 id. 524; 4 Exch. 257; *Stevens v. Armstrong*, 6 N. Y. 435; *Reedie v. London, etc., R. R. Co.*, 4 Exch. 244, 256-257; *Hobbit v. Same*, id. 254; *Moore v. Gadsden*, 93 N. Y. 17; *Knuppel v. Knickerbocker Ice Co.*, 84 id. 491; *Massoth v. D. & H. C. Co.*, 64 id. 532; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 id. 531.) The owner is liable where the thing contracted for is, of itself, the cause of the injury; and is not liable where the injury is caused by something collateral to that contracted for. (*King v. N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 185; *Storrs v. City of Utica*, 17 id. 104, 107; *Pack v. Mayor, etc.*, 4 Seld. 222; *Kelly v. Mayor, etc.*, 1 Kern. 432; *Water Co. v. Ware*, 16 Wall. 566; *Ferguson v. Hubbell*, 97 N. Y. 511.) The court will presume, in the absence of evidence to the contrary, that the defendant contemplated the accomplishment of the objects contracted for in a lawful rather than an unlawful manner. (*Butter v. Hunter*, 7 Hurlst. & Norm. 825, 832; *Earl v. Beadleston*, 10 J. & S. 294, 301.)

MILLER, J. This action was brought by the plaintiff to recover damages alleged to have been sustained by means of the negli-

Opinion of the Court, per MILLER, J.

gence of defendant's agents and servants in making repairs and improvements upon the hotel of the defendant, situate in the city of New York. The alleged negligence consisted in fixing and securing the staging used in performing the work, and the proof showed that the ladder used as a scaffold was suspended from the roof over the eaves of the hotel, and that upon it were placed planks which were used as a platform upon which the workmen employed stood to do the work. This scaffold was moved from time to time around the bay windows from place to place. A heavy wind was blowing, and while shifting the ladder, a gust came, and the working of the wind and the grating against the cornice and wall cut the rope which held the planks on the ladder, and the wind turned the planks up so that they fell, and one of them in falling to the sidewalk bounded and struck the plaintiff. One Burford, who was engaged in the roofing and cornice business, was employed by the defendant to do the work, which was intended to obviate a difficulty caused by pigeons making their nests under the eaves of the roof of the hotel.

At the close of the testimony, a motion was made to dismiss the complaint upon the ground, among others, that if there was proof of negligence, it was not the negligence of the defendant, or his agents or servants, but of an independent contractor, and the plaintiff's counsel then asked to go to the jury upon several grounds, which were stated and refused. The motion to dismiss the complaint was granted, and the defendant's counsel excepted to the decision of the court.

The employment of Burford was of a general character, and the contract between him and the defendant was not restricted as to time or amount, or the specific services which were to be rendered. The accident occurred while Burford and his men were engaged in the performance of this work, and this action was sought to be maintained upon the ground that the workmen employed, including Burford, were the servants of the defendant, and that the defendant as owner of the real estate was responsible to third persons for the carelessness, negligence or want of skill in those who were carrying on or conducting the business, and this whether the persons employed were working

Opinion of the Court, per MILLER, J.

for wages or on contract. We think that the principle laid down has no application to the facts presented in the case at bar. As a general rule, where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, with no restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of the master, but he is an independent contractor, and the owner is not liable for his acts or the acts of his workmen who are negligent and the cause of injury to another. If the owner of a building employs a mechanic to make repairs upon the same without any specific arrangement as to terms and conditions, such employment is in the nature of an independent contract, which imposes upon the employé the responsibility incurred by acts of negligence caused by himself or those who are aiding him in the performance of the work. It is absolutely essential in order to establish a liability against a party for the negligence of others, that the relation of master and servant should exist. In *King v. N. Y. C. & H. R. R. Co.* (66 N. Y. 181, 184) the rule applicable to such a case is laid down by ANDREWS, J., as follows: "It is not enough in order to establish the liability of one person for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them. Unless the relation of master and servant exists, the law will not impute to one person the negligent act of another."

In the case considered, we think that by the contract between the defendant and Burford, the relation of master and servant was not created. Burford was a mechanic engaged in a particular kind of business which qualified him for the perform-

Opinion of the Court, per MILLER, J.

ance of the work which he was employed to do. By the arrangement with the defendant he was an independent contractor engaged to perform the work in question. He was employed to accomplish a particular object by obviating the difficulty which he sought to remove. The mode and manner in which it was to be done and the means to be employed in its accomplishment were left entirely to his skill and judgment. Every thing connected with the work was wholly under his direction and control. No right was reserved to the defendant to interfere with Burford or the conduct of the work. It was the result which was to be attained that was provided for by the contract without any particular method or means by which it was to be accomplished. So long as the contractor did the work the defendant had no right to interfere with his way of doing it. The fact that no price was fixed and no specifications made as to the work to be done did not render the contract one of mere hire and service, or create the relation of master and servant between the parties. It cannot, we think, be said that Burford did not agree to do the work required of him, and that no contract was made after the subject-matter and the difficulties attending the work had been considered and talked about. Burford said he would try and do something, and the defendant replied he didn't care how he did it. The conversation had amounted in law to an agreement that Burford would perform all the work that was required of him according to his own judgment as to what was necessary to be done to accomplish the object intended. He was an independent contractor, and the men employed by him were his servants and had nothing to do with the defendant. Burford was not the agent of the defendant in any sense in purchasing the material or in hiring the men to do the work. That the work was charged for by the day could make no difference, and did not alter the position which Burford occupied, in reference to the defendant, as an independent contractor. It did not give the defendant control over the job, or authority to hire or discharge the men, or render him in any way liable to them instead of Burford. It is very evident that the men employed were the

Opinion of the Court, per MILLER, J.

servants of Burford, and, therefore, the defendant cannot be made responsible for their negligence. The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. (Shearm. & Redf. on Neg., § 76.) In *Blake v. Ferris* (5 N. Y. 48, 56), within the rule last stated it is held that when a man is employed in doing a job or piece of work with his own means, and his own men, and employs others to help him, or to execute the work for him, and under his control, he is the superior who is responsible for their conduct, no matter for whom he is doing the work. To attempt to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded. Upon these authorities there would seem to be no question as to the character of Burford's employment.

We are referred by the learned counsel for the appellant to numerous authorities as upholding the doctrine that Burford was not engaged in an independent employment, and that the defendant was, therefore, liable. After a careful examination we are satisfied that none of them sustain this position. Those cited from this State are certainly in a contrary direction. The other cases cited are clearly distinguishable from the case at bar, and establish no rule adverse to that which is supported, as we have seen, by the authorities in this State.

The claim that the ladder or scaffold suspended under the eaves of the hotel was a nuisance is not well founded. The proof on the trial did not show that the building was on the line of the street. It did show that the hotel was separated from the sidewalk by an area of fifteen feet. Without further proof it is difficult to see how the ladder or staging could be regarded as such an obstruction to the street as to constitute a nuisance. The action is based upon the ground of negligence, and there is nothing in the complaint alleging that the scaffold

Opinion of the Court, per MILLER, J.

was suspended over the sidewalk or was in any respect an obstruction to the street. The gist of the action is negligence and unskillfulness in the construction of the scaffolding. It may be added that the scaffold itself was suspended for a legitimate purpose connected with the reparation and improvement of the building. It was not necessarily injurious and dangerous or an obstruction on the street, and if properly used might well be employed for the purpose intended. It could only become dangerous by being improperly constructed or by some wrongful and willful act. In view of all the facts it cannot, we think, be maintained that the scaffold necessarily was a nuisance.

The claim that the ladder was suspended in violation of the city ordinance is not well founded. The ordinance referred to prohibits the hanging of any goods, wares, or merchandise, or any other thing, in front of any building at a greater distance than one foot. It was aimed against the obstruction of the streets. It is not apparent that the ladder overhung the street, but even if such was the case, it was a mere temporary structure, erected for the purpose of repairing the building, and not an obstruction within the meaning and spirit of the ordinance, which, it is manifest, was directed against goods, etc., which were exposed for sale, or for the purpose of attracting public attention thereto. The construction contended for would prevent the use of scaffolds in the reparation of buildings, which never could have been intended.

It is also insisted that the work in question was intrinsically dangerous, and hence the party authorizing it would be liable whether he did the work himself or let it out on contract. The answer to this position is, that the work itself was not necessarily injurious or dangerous. It was merely necessary repairs or improvements for the benefit of the building, which, under ordinary circumstances, could be made without any serious results. The accident was caused by a gust of wind, which might well occur in the performance of any work of a similar character, and which could not well be guarded against or provided for. The act itself could only become dangerous and cause injury

Statement of case.

by some unforeseen circumstance, and the rule stated is not applicable.

There is, we think, no force in the position that the injury complained of was the result of an act absolutely necessary for the contractor to do in order to accomplish the desired end, and the suspending of the ladder may, therefore, be said to have been done by the defendant, and he is liable, although it was done by an independent contractor. It is apparent, from the evidence, that the injury resulted, not from any thing contracted for by the defendant, but something collateral thereto. The defendant's contract related to the improvement of the building alone. What was necessary to be done for that purpose, and the manner in which it should be done, rested with the skill and judgment of the contractor. The defendant was absent at the time, and had no knowledge of what was done or the manner in which it was done. The doing of the work and the mode in which it was to be accomplished were matters collateral to the contract between the defendant and Burford. For these the defendant could not be held responsible.

After a careful consideration of the questions presented, it follows that no error was committed by the judge in dismissing the complaint, or in his refusal to allow the case to go to the jury, nor did he err upon the trial in striking out the testimony given as to the declaration of one of the witnesses sworn upon the trial.

The judgment should be affirmed.

All concur.

Judgment affirmed.

THE DUPLEX SAFETY BOILER CO., Respondent, v. C. HENRY
GARDEN et al., Appellants.

The parties entered into a contract by which plaintiff agreed to alter certain boilers belonging to defendants, in a manner specified, the stipulated price for the work defendants agreed to pay as soon as they "are satisfied that the boilers as changed are a success." The work was completed

101	387
108	256
101	387
116	256
101	387
120	256
120	506

101	387
148	256

101	387
6168	408

101	387
171	72

Opinion of the Court, per DANFORTH, J.

within the time agreed upon, and defendants then began and thereafter continued the use of the boilers without objection or complaint. In an action to recover the contract-price defendants claimed that the question as to whether the work was a success was one for them alone to determine. *Held* untenable; and that a simple allegation of dissatisfaction, without a good reason therefor, was no defense.

Under such a contract, that which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with.

(Argued January 25, 1886; decided February 9, 1886.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 12, 1884, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was upon a contract, the nature of which, and the material facts are stated in the opinion.

John A. Deady for appellants. Whether defendants were satisfied that the boilers as repaired were a success or not was, under the contract, for defendants alone to decide, and it was incumbent upon plaintiff to show they wereso satisfied. (*McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136; *Taylor v. Ames*, 6 Lans. 280; *Gray v. Cent. R. R. Co. of N. J.*, 11 Hun, 70; *Huggans v. Fryer*, 1 Lans. 276; *Chadwick v. Lamb*, 29 Barb. 518; *Rich v. Milk*, id. 516; *Hall v. Simpson*, 19 How. Pr. 481; *Farrell v. Hildreth*, 38 Barb. 178.)

H. C. Place for respondent.

DANFORTH, J. The plaintiff sued to recover \$700, the agreed price, as it alleged, for materials furnished and work done for the defendants at their request. The defense set up was that the work was done under a written contract for the alteration of certain boilers, and to be paid for only when the defendants "were satisfied that the boilers as changed were a success." Upon the trial it appeared that the agreement between the parties was contained in letters, by the first of which the defendants said to

plaintiff: "You may alter our boilers, changing all the old sections for your new pattern; changing our fire front, raising both boilers enough to give ample fire space; you doing all disconnecting and connecting, also all necessary mason work, and turning boilers over to us ready to steam up. Work to be done by tenth of May next. For above changes we are to pay you \$700, as soon as we are satisfied that the boilers as changed are a success, and will not leak under a pressure of one hundred pounds of steam."

The plaintiff answered, "accepting the proposition," and as the evidence tended to show, and as the jury found, completed the required work in all particulars by the 10th of May, 1881, at which time the defendants began and thereafter continued the use of the boilers.

The contention on the part of the appellants is that the plaintiff was entitled to no compensation, unless the defendants "were satisfied that the boilers as repaired were a success, and that this question was for the defendants alone to determine," thus making their obligation depend upon the mental condition of the defendants, which they alone could disclose. Performance must of course accord with the terms of the contract, but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered, remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed; time of payment is alone uncertain. The boilers were changed. Were they, as changed, satisfactory to the defendants? In *Folliard v. Wallace* (2 Johns. 395), W. covenanted that in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. \$150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought, the defendant set up

that he was "not satisfied," and the plea was held bad, the court saying, "a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext and cannot be regarded." This decision was followed in *City of Brooklyn v. Brooklyn City R. R. Co.* (47 N. Y. 475), and *Miesell v. Globe Mut. L. Ins. Co.* (76 id. 115).

In the case before us the work required was specified, and was completed; the defendants made it available and continued to use the boilers without objection or complaint. If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for according to the doctrine of the above cases, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

Another rule has prevailed, where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made, or the work done, may properly determine for himself — if the other party so agrees — whether it shall be accepted. Such instances are cited by the appellants. One who makes a suit of clothes (*Brown v. Foster*, 113 Mass. 136), or undertakes to fill a particular place as agent (*Tyler v. Ames*, 6 Lans. 280), mold a bust (*Zuleski v. Clark*, 44 Conn. 218), or paint a portrait (*Gibson v. Cranage*, 39 Mich. 49; *Hoffman v. Galluher*, 6 Daly, 42), may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it, no error has been shown.

The judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

DENNIS LARMORE, Respondent, v. THE CROWN POINT IRON Co., Appellant.

A person who goes upon the land of another, without invitation, to secure employment from the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey. Although it may be shown that the owner might have ascertained the defect by the exercise of reasonable care, he owes no legal duty to a stranger so coming upon his premises, which requires him to keep the machinery in repair.

The case distinguished from one where the person injured is an employe of the owner, or where the injury is caused by some dangerous thing placed by the owner upon the premises, without giving warning thereof, or where the owner, in the prosecution of his own purpose or business, invites another, either expressly or impliedly, to come upon his land, who is injured by unreasonable or concealed dangers, or where a licensee is injured by some affirmative negligence.

(Argued January 26, 1886; decided February 9, 1886.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the second Tuesday of September, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

The material facts are stated in the opinion.

M. D. Grover for appellant. Defendant owed plaintiff no duty; he was, when injured, a trespasser or mere licensee upon defendant's premises. (*Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514; *Sullivan v. Waters*, 14 Ir. C. L. 466; *E. & T. H. R. R. Co. v. Griffin*, 100 Ind. 221; 50 Am. Rep. 783; *Wright v. Rawson*, 3 N. W. Rep'r, 726; *Dogget v. Ill. Cent. R. R. Co.*, 34 Ill. 284; *Bulch v. Smith*, 7 H. & N. 723; *Nicholson v. Erie R. Co.*, 41 N. Y. 534; *Sutton's Case*, 66

101	391
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108	216
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119	325
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132	508

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167	214

Opinion of the Court, per ANDREWS, J.

id. 243; *Southcoats v. Stanley*, 1 H. & M. 246; *Victory v. Baker*, 67 N. Y. 366.)

Matthew Hale for respondent. Defendant was bound to use reasonable care in the construction of the whimsey. (Shearm. & Redf. on Neg., § 590; *Cowley v. Sunderland*, 6 H. & N. 565.) The accident could not have happened without negligence on the part of defendant. (Shearm. & Redf. on Neg., § 13; *Byrne v. Boadle*, 2 H. & C. 722; *Miller v. St. John*, 57 N. Y. 567, 570; *Kearney v. London, etc., R. R. Co.*, 5 Q. B. 411; L. R., 6 Q. B. 759; *Caldwell v. N. J. Steam'b't Co.*, 47 N. Y. 282, 291, 293.) Plaintiff was not, under the circumstances, a trespasser or a mere licensee. (Shearm. & Redf. on Neg., § 498; *Beck v. Carter*, 68 N. Y. 253; *Corby v. Hill*, 4 C. B. [N. S.] 556; *Chapman v. Rothwell*, El., Bl. & El. 168; *Smith v. Docks Co.*, L. R., 3 C. P. 326; *Indermaur v. Dames*, 2 id. 311; *Holmes v. N. E. R. R. Co.*, 4 Exch. 254; 6 id. 123; *Barry v. N. Y. C. R. R. Co.*, 92 N. Y. 289, 293.)

ANDREWS, J. We are unable to perceive, upon the evidence, that any duty rested on the defendant to keep the *whimsey* in repair for the protection of the plaintiff. The defendant for its own purposes, and in the prosecution of its business, had constructed a machine for raising ore from its mines. It consisted of an upright, or mast, in which a lever was inserted by the device of a mortise and tenon, and as an additional precaution for keeping the lever in place, an iron pin was driven through the mast and tenon. The machine was worked by attaching horses to the end of the lever, by means whereof, a bucket filled with ore, was raised from the mine to the surface of the ground, and when discharged, the bucket by its own weight descended, turning the lever with some rapidity in its descent. The lever on the occasion in question, while the bucket was descending, was thrown out of the socket at the mast, and flying around, hit and broke the legs of the plaintiff, who was in a path leading to one of the pits worked by the defendant. The machine had been in use several years without accident. It appeared on

Opinion of the Court, per ANDREWS, J.

examination of the lever, after the occurrence in question, that the pin which held it to the mast, had broken through the wood of the tenon back of the point where the pin passed through it, and the lever not being firmly held to its place by the other arrangements, came out and caused the injury. There was evidence that other and surer precautions might have been, and in other mines, had sometimes been taken, to secure the lever to the mast, than those adopted by the defendant. But the judge excluded the question of faulty construction from the jury, and submitted to them as the sole ground of negligence, to be considered, whether the defendant had omitted to make proper inspection of the machine, to discover defects arising after its original construction, or to make proper repairs to render it safe.

The negligence of the defendant, if any, upon the case as presented, consisted in an omission to take affirmative measures to ascertain and remedy defects in a machine originally suitable, developed by use, and which might have been discovered by proper inspection. It may be assumed, and the assumption is justified by decided cases, that as to persons standing in certain relations to the defendant, a duty rested upon the company to exercise reasonable care in the maintenance and reparation of the machine, and that a failure to perform it, would subject the defendant to liability to persons occupying such special relations, who should sustain injury from the omission. But the plaintiff stood in no such relation to the defendant, as imposed upon it the duty to keep the machine in repair. He was, at the time of the accident in every legal sense, a stranger to the defendant. He had before that been employed by the superintendent of the company to work by the day, and had been assigned to a particular service, which, however, he had abandoned two days before the accident, and on the day of the accident he went upon the defendant's land to seek further employment at a pit to which the path used by the workmen led on which he was standing when the accident happened. He was on the premises at most by the mere implied sufferance or license of the defendant, and not on its invitation express

Opinion of the Court, per ANDREWS, J.

or implied, nor was he there in any proper sense on the business of the company. The suggestion made to him by the foreman at pit No. 5, two days before the accident, on the occasion of his refusing to work at that pit any longer on account of the supposed danger, that he could probably "get a chance" at some other pit was not an authority or invitation by the company to him to visit the other pits on the premises. The foreman had no authority to give the plaintiff permission to go elsewhere upon the defendant's lands, and the suggestion was obviously a mere friendly one made by the foreman in the interest of the plaintiff. The fact that the plaintiff had on going to pit No. 10, engaged to commence work there on the following Monday, did not change his relation to the defendant, or make him other than a mere licensee on the premises. He went there on his own business, and in returning he was subserving his own purposes only. The precise question is whether a person who goes upon the land of another without invitation to secure employment from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises not obviously dangerous, which he passes in the course of his journey if he can show that the owner might have ascertained the defect by the exercise of reasonable care. We know of no case which goes to this extent. There is no negligence in a legal sense which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons, and not as to others, depending upon peculiar relations and circumstances. An employer is required to take reasonable precautions and to exercise reasonable care in providing safe machinery and appliances for the use of his servant. The duty arises out of the relation. (*Fuller v. Jewett*, 80 N. Y. 46.) The owner of land in general may use it as he pleases, and leave it in such condition as he pleases. But he cannot without giving any warning, place thereon, spring-guns, or dangerous traps which may subject a person innocently going on the premises, though without actual permission or license, to injury, without liability. The value of

Opinion of the Court, per ANDREWS, J.

human life, forbids measures for the protection of the possession of real property against a mere intruder, which may be attended by such ruinous consequences. The duty in this case grows out of the circumstances, independently of any question of license to enter the premises. (*Bird v. Holbrook*, 4 Bing. 628.) So, also, where the owner of land in the prosecution of his own purposes or business, or of a purpose or business in which there is a common interest, invites another either expressly or impliedly to come upon his premises, he cannot with impunity expose him to unreasonable or concealed dangers as for example, from an open trap in a passageway. The duty in this case is founded upon the plainest principles of justice. (*Corby v. Hill*, 4 C. B. [N. S.] 556; *Smith v. London & St. K. Docks Co.*, L. R., 3 C. P. 326; *Holmes v. North Eastern Railway Co.*, L. R., 6 Exch. 123.) The duty of keeping premises in a safe condition even as against a mere licensee may also arise where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted and enjoyed to great danger. The case of running a locomotive without warning over a path across the railroad which had been generally used by the public without objection, furnishes an example. (*Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289. See, also, *Beck v. Carter*, 68 id. 283.) The cases referred to proceed upon definite and intelligible grounds, the justice of which cannot reasonably be controverted. But in the case before us, there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury. The machine was not intrinsically dangerous; the plaintiff was a mere licensee; the negligence, if any, was passive and not active, of omission and not of commission. Under the circumstances, we think the motion for nonsuit should have been granted. (See *Severy v. Nickerson*, 120 Mass. 306; *Hounsell v. Smyth*, 7 C. B. [N. S.] 731.)

The judgment should therefore be reversed, and a new trial ordered.

Statement of case.

RAPALLO, EARL and FINCH, JJ., concur; DANFORTH, J., concurs in result; RUGER, Ch. J., dissents; MILLER, J., does not vote.

Judgment reversed.

WILLIAM E. MARSH, Respondent, v. CHARLES F. CHICKERING et al., Appellants.

It seems that where a servant, employed in the performance of ordinary labor, in which no machinery is used or materials furnished requiring great skill and care, is injured by a defective instrument or tool furnished by the master, of the defects in which the servant has full knowledge and comprehension, he cannot hold the master responsible.

Plaintiff, a servant in the defendants' employ, was injured by the slipping of a ladder which he was using in lighting lamps in front of defendants' building. The ladder was a new one which, by defendants' permission, plaintiff himself had ordered made, and which he had used in safety for over six weeks. After the ladder was delivered he told defendants' superintendent that it ought to be hooked and spiked, or there would be an accident. The superintendent promised to have this done. This promise was repeated several times, but was not performed. The accident occurred upon a stormy night, sleet, snow and rain falling, and the wind blowing. Plaintiff had lighted safely seven lamps, changing the position of the ladder each time; when lighting the eighth the ladder slipped. In an action to recover damages, *held*, that these facts did not justify a recovery, as it failed to prove that defendants had not furnished a proper ladder.

A master does not owe to his servant the duty of furnishing the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable.

(Argued January 26, 1886; decided February 12, 1886.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 26, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

101	396
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101	396
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Statement of case.

Theodore H. Swift for appellants. To enable plaintiff to recover, he was bound to show that the injury was sustained through the defendants' negligence, and that there was no contributory negligence on his part. (78 N. Y. 483; 58 id. 248; 84 id. 58; 98 id. 198, 280.) Defendants were not bound to furnish plaintiff with the best, most approved or most recent machinery or tools. (15 Weekly Dig. 103; 98 N. Y. 274, 562.) If defendants' superintendent was negligent they were not liable, he being a co-employe with plaintiff. (*Crispin v. Babbit*, 81 N. Y. 516; *McCosker v. L. I. C. R. R. Co.*, 84 id. 77; 70 id. 171, 174-176.) A knowledge of the dangerous character of a tool an employe uses is fatal to his recovery for injury from its use. (*Bell v. A. & W. R. R. Co.*, Alb. L. J., April 10, 1883; *Seymour v. Maddox*, 16 Q. B. 326; *Seaver v. B. & M. R. R. Co.*, 14 Gray, 466.) In an action like the case at bar the master must be at fault and know of it, and the servant must be free from fault to insure a recovery. (*Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; 12 R. I. 112; 34 Am. Rep. 615; 113 Mass. 396; 98 N. Y. 562; 32 Alb. L. J. 134; *Leonard v. Collins*, 70 N. Y. 90.) Plaintiff's continued use of the ladder was negligence. (1 New Eng. Rep'r, 124.) The court erred in allowing plaintiff to prove that the day after the accident defendants had hooks put on the ladder. (*Baird v. Daly*, 68 N. Y. 547; *Salters v. D. & H. C. Co.*, 3 Hun, 338; *Morrel v. Peck*, 24 id. 37; 31 id. 28.) Plaintiff's contributory negligence was a question of law. (*Davis v. Third Ave. R. R. Co.*, 41 N. Y. Super. Ct. 31; *Bauleo v. N. Y. C. R. R. Co.*, 59 id. 356; Whart. on Neg., § 238; 8 C. B. [N. S.] 568; 98 N. Y. 280.)

A. R. Dyett for respondent. The fact that plaintiff knew of the danger of using the ladder and continued to use it was not contributory negligence as matter of law, in view of defendants' promise to repair it after notice to them of the defect. (*Fuller v. Jewett*, 80 N. Y. 46; *Flike v. B. & A. R. R. Co.*, 53 id. 549, 553; *Booth v. B. & A. R. R. Co.*, 73 id. 38; *Mehan v. Syr. & B. R. R. Co.*, id. 585.) Acts the

Opinion of the Court, per MILLER, J.

master is bound to perform for the safety and protection of his employes cannot be delegated so as to exonerate the master from liability to his servant. (*Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; 53 N. Y. 549, 553; 25 id. 262; 39 id. 468; *Hough v. T. & P. R. R. Co.*, 9 Rep'r, 193, 198, 199; *Cooley on Torts*, 559; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 528, 534-537; *Hawley v. No. Cent. R. R. Co.*, 82 id. 370.)

MILLER, J. The plaintiff seeks to recover in this action for injuries sustained, while in the defendants' employ, by means of a ladder used by him in lighting the gas lamps connected with and in front of the defendants' building.

The plaintiff had lighted seven of the eight lamps by the use of the ladder, and, when in the act of lighting the eighth one, the ladder slipped and plaintiff's leg caught in one of the rungs, and that caused the injury. It was a stormy night in the month of March, sleeting and raining, snowing and windy. The plaintiff, previous to this occurrence, had used a ladder of the defendants, which broke with him, and he had spoken to one of the defendants, stating the accident and saying that they ought to have a good ladder, hooked and spiked, or else there would be an accident. The defendant spoken to told him to go to the superintendent, and direct him to order a new ladder. This the plaintiff did, and he then went to a ladder-yard and ordered a new ladder himself at the request of the superintendent, and after the ladder had been delivered, he told the superintendent that it ought to be hooked and spiked, and the superintendent promised to have hooks and spikes put on it but never did. The plaintiff used the ladder for six weeks or two months, and during that time he says he spoke to the superintendent twice about it, the second time three or four weeks before the accident, saying to him that the ladder was not hooked and spiked and there would be an accident. The superintendent replied that he would have it fixed.

The right of the plaintiff to maintain this action is founded upon the alleged negligence of the defendants in not furnishing a proper ladder for the use of the plaintiff in the work he was

engaged to perform. It rests upon the principle that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish proper, perfect and adequate machinery or other materials and appliances necessary for the proposed work. (*Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; *Shearm. & Redf. on Neg.*, § 92.)

As a general rule it is to be supposed that the master who employs a servant has a better and more comprehensive knowledge as to the machinery and materials to be used than the employe who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the performance of the service required of him.

The rule stated, however, is not applicable in all cases, and where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work devolving upon him, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof.

In considering the application of the rule just stated due regard must be had to the limited knowledge of the employe as to the machinery and structure on which he is employed and to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise. (*Powers v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 274, 280.)

In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employe has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment and who uses the ordinary tools employed in such work, to which he is accustomed and in regard to which he has perfect knowledge,

Opinion of the Court, per MILLER, J.

can hardly be said to have a claim against his employer for negligence, if in using a utensil, which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has superior knowledge and has thereby imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and if he is thereby injured it is by reason of his own fault and negligence. The fact that he notified the master of the defect and asked for another instrument, and the master promised to furnish the same, in such a case, does not render the master responsible if an accident occurs.

We have been referred to no adjudicated case which upholds the liability of a party under circumstances of the same character as those presented by the evidence here. A rule imposing such a liability in the case considered would be far reaching and would extend the principle stated to many of the vocations of life for which it was never intended. It is one of a just and salutary character, designed for the benefit of employes engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those engaged in ordinary labor which only requires the use of implements with which they are entirely familiar. The plaintiff was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to.

Even if it may be considered that a right of action exists in this case in favor of the plaintiff, under any circumstances, we think that the evidence would not justify a recovery for the reason that the defendants did not fail in furnishing a proper ladder for the use of the plaintiff in lighting the lamps. The rule is that the master does not owe to his servants the duty to furnish the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances. (*Burke v. Witherbee*, 98 N. Y. 562; *Shearm. & Redf. on Neg.*, § 92.) The defendants had procured a ladder

Statement of case.

which ordinarily would be regarded as safe for the purpose for which it was used. The plaintiff had used it for a long time without any accident or danger, and on the very night of the accident it had been placed in position and used several times successfully. That it failed at last for any reason does not establish that it was unfit for use. It might, perhaps, have been more perfect if it had had hooks and spikes, but this improvement was not absolutely essential to relieve the defendants from liability. It was enough that it was reasonably safe and suitable within the rule cited, and under such circumstances an action will not lie.

There are other questions in the case, but in view of the conclusion arrived at their examination is not required.

The judgment should be reversed and a new trial granted, with costs to abide the event

All concur, except RUGER, Ch. J., dissenting.

Judgment reversed.

FRANKLIN MARSH, Respondent, v. JOHN H. MASTERTON, Appellant.

A judgment in a former suit between the same parties is a bar to a subsequent action only when the point or question in issue is the same in both; the former judgment has no effect upon questions not involved in it, which were not then open to inquiry or the subject of litigation.

Plaintiff brought an action against defendant, the complaint in which alleged a partnership between them, and asked for a dissolution thereof, the appointment of a receiver, and an accounting, etc. The answer was a general denial. On the trial it was found as matter of fact that no co-partnership existed, and the complaint was dismissed. Plaintiff then brought this action to recover for labor and services alleged to have been rendered under an agreement between the parties, by which he was employed to oversee, take charge of, carry on, and labor in the business of the defendant, and the latter agreed to pay him for such service one-half the profits of the business after deducting interest on the capital invested. Plaintiff asked judgment for his share of the profits. *Held*, that the former judgment was not a bar.

The business carried on was that of mason and builder. Upon the trial

Statement of case.

defendant claimed credit for moneys paid as gratuities to the architects having charge of the work. There was no proof that the payments were beneficial to the parties, or that they were necessary or justifiable upon business principles. *Held*, that the credits were properly rejected, Defendant, after plaintiff's employment had terminated, took in payment for work done, from a person perfectly responsible, two bonds which he knew at the time to be worthless. *Held*, that defendant was not entitled to any deduction for the loss thus sustained.

(Argued January 29, 1886; decided February 12, 1886.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 4, 1884, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 18 J. & S. 187.)

The nature of the action and the material facts are stated in the opinion.

S. W. Rosendale for appellant. Assuming that plaintiff now proves a hiring for half the profits as compensation, the former judgment is a bar; evidence of plaintiff in this suit shows that if there were any such contract as he claims, it was a contract of partnership and not one of hiring, and the former judgment is then unquestionably a bar. (Coll. on Part. [5th Am. ed.], § 44, note 2; 7 Jarm. Conv. by Sweet, 11, note a; *Holmes v. Old Colony R. R. Corp.*, 5 Gray, 58; 1 Story's Eq., §§ 442, 459c; *Fairchild v. Robinson*, 7 Rob. 572; *Russell v. Corne*, 20 N. Y. 81; *Van Rensselaer v. Jones*, 2 Barb. 643; *Fels v. Vestvali*, 2 Keyes, 153; *Lobdell v. Lobdell*, 36 N. Y. 327.) If in the first suit plaintiff could have proved the very contract he now alleges, and have had an accounting thereon, then the former suit is a bar, for a former adjudication is quite as much a bar, for all that could have been proved therein as for all that was proved therein. (*Embury v. Connor*, 3 N. Y. 522; *Clemens v. Clemens*, 37 id. 74; *Bloomer v. Sturges*, 58 id. 176; *Jordan v. Van Epps*, 85 id. 436; *Smith v. Smith*, 79 id. 634; *Pray v. Hegeman*, 98 id. 351.) In any view, the testimony of defendant relied upon by plaintiff is equally consistent with the idea of partnership

Statement of case.

or hiring, and of course, being consistent with either, can prove neither. (71 N. Y. 141.) There being no evidence, then, of a contract of hiring, the finding that there was one is error in law. (*Sheldon v. Sheldon*, 51 N. Y. 354; *Mason v. Lord*, 40 id. 477; *Fellows v. Northrup*, 39 id. 117.)

William A. Courseen for respondent. In order to bar a second action the circumstances must be such that the plaintiff might have recovered in the first for the same cause alleged in the second. (*Stowell v. Chamberlain*, 60 N. Y. 272, 276; *Palmer v. Hussey*, 87 id. 303.) Whether the matter might have been tried in the former action must appear from the record alone; whether it was tried may be proved by parol. (*Campbell v. Butts*, 3 N. Y. 173; *Smith v. Smith*, 79 id. 634; *Young v. Rummell*, 2 Hill, 479, 481; *Dunckle v. Wiles*, 6 Barb. 515, 529.) The trial of the first action having been had before the court, without a jury, the facts found by the court are conclusive upon the parties, and will be considered as *res adjudicata* for all purposes. (*Bissell v. Kellogg*, 60 Barb. 617; *Arnold v. Angell*, 62 N. Y. 508.) The doctrine of *res adjudicata* applies only where a party has a full opportunity to assert his rights, and ask for the remedy, in an action presenting or affording the opportunity to present the claim, and where an issue is or can be legitimately framed to try it, and the court has jurisdiction, both of the parties and of the subject-matter. (*Dawley v. Brown*, 79 N. Y. 390, 397; *Stowell v. Chamberlain*, 60 id. 272; *Matthews v. Duryee*, 4 Keyes, 525, 538; *Campbell v. Consalus*, 25 N. Y. 613; *Burdick v. Post*, 12 Barb. 168; *Baker v. Rand*, 13 id. 152, 160; *Vaughan v. O'Brien*, 57 id. 491, 495.) It is not sufficient that the transactions involved in and giving rise to the two actions are the same. (*Stowell v. Chamberlain*, 60 N. Y. 272; *Dawley v. Brown*, 79 id. 390; *Jackson v. Andrews*, 98 id. 672; *Derbeth v. DeGraaf*, 51 N. Y. Supr. Ct. [J. & S.] 369; *Arnold v. Clark*, 9 Daly, 259; *Perry v. Dickinson*, 85 N. Y. 345.) The mere fact that by the agreement between the plaintiff and the defendant, the plaintiff was to receive one-half of the

Opinion of the Court, per EARL, J.

profits, does not show that a partnership existed between them. (*Lewis v. Greider*, 51 N. Y. 231; *Bonty v. Swift*, id. 594; *Osbrey v. Reimer*, id. 630; *Burckle v. Eckhart*, 1 Den. 337; *S. C.*, 3 N. Y. 132; *Conklin v. Barton*, 43 Barb. 435; *Ogden v. Astor*, 4 Sandf. 311, 321; *Pattison v. Blanchard*, 5 N. Y. 186; *Heimstreet v. Howland*, 5 Den. 68; *Legget v. Hyde*, 58 N. Y. 272; *Smith v. Bodine*, 74 id. 33; *Richardson v. Hughitt*, 76 id. 55; *Burnett v. Snyder*, 81 id. 550; *Curry v. Fowler*, 87 id. 30; affirming *S. C.*, 46 N. Y. Super. 195; *Bendel v. Hettrick*, 35 id. 405; *Adee v. Cornell*, 25 Hun, 78; 3 Kent's Com. 33; *Smith v. Bodine*, 74 N. Y. 30; *Merwin v. Playford*, 3 Robt. 702; *Cummings v. Mills*, 1 Daly, 520; *Lamb v. Grover*, 47 Barb. 317.)

EARL, J. In November, 1873, the plaintiff commenced an action against the defendant, and in his complaint alleged that on the 1st day of May, 1872, at the city of New York, he entered into copartnership with the defendant for the purpose of carrying on the business of masons and builders; that by the terms of the copartnership the partners were to share equally in the profits of the business, the defendant to be allowed interest, however, on his capital; that thereafter from the 1st day of May, 1872, until the 1st day of August, 1873, the plaintiff and defendant carried on the copartnership business successfully, and that there were more than sufficient assets of the copartnership to pay all its debts; that since the 1st day of August, 1873, the defendant had taken exclusive possession of the copartnership books and property, and had prevented the plaintiff from having any control over or access to the same; that the plaintiff and defendant were unable to agree upon the terms and mode of the dissolution, and the winding up of the affairs and business of the copartnership, and were unable to agree upon the person who should possess and control the partnership books and assets and settle up its affairs; and he demanded judgment that the partnership should be dissolved, that a receiver of its property should be appointed by the court with the usual powers of such receivers; that an

accounting should be had, the assets converted, applied and divided, and for other relief. The defendant interposed a general denial to the complaint and demanded that it should be dismissed, with costs. That action was subsequently brought to trial, and the referee found as matter of fact that the plaintiff and defendant did not enter into copartnership as alleged in the complaint; and as a conclusion of law, he found that the complaint should be dismissed and that the defendant should have judgment for costs. Thereafter, in October, 1875, the plaintiff commenced this action, and alleged in his complaint, that he was by trade and occupation a mason; that the defendant carried on the business of a mason and builder; that on or about the 1st day of May, 1872, at the city of New York, the plaintiff and defendant made and entered into an agreement whereby, in consideration of the plaintiff overseeing, taking charge of, carrying on and laboring in the business of the defendant, he agreed to and with the plaintiff to pay him for such services one-half of all the profits derived from the business, after deducting the interest on the capital invested by the defendant; that afterward from the 1st day of May, 1872, until the 1st day of August, 1873, the plaintiff was continually in the employment of the defendant and performed the services, and managed, took charge of and labored for the defendant in his business under the agreement; that the business of the defendant from the 1st day of May, 1872, until the 1st day of August, 1873, was very successful and profitable, and that he made and received as profits of the business during that time, after deducting the interest on the capital invested, the sum of \$21,000, and that for one-half of that amount, less a credit mentioned, the defendant was indebted to plaintiff under their agreement; and he demanded judgment for \$7,862.20 with interest, besides costs. To this complaint the defendant interposed an answer in which he denied the allegations of the complaint, and alleged in bar of the action the judgment recovered by him in the former action. The cause was referred to a referee, and after hearing the evidence he found the agreement between the parties to be substantially as alleged in the complaint, and he

Opinion of the Court, per EARL, J.

took the account between them and found there was due the plaintiff under the agreement upwards of \$7,000, for which he ordered judgment. In reference to the former action and the recovery therein, he found as matter of fact that that action was brought in respect to the same work and for an accounting and recovery in respect to the same profits for which this action was brought, but he found as matter of law that that action was not a bar to this.

We think the referee correctly held that the former action was not a bar to this. The causes of action in the two suits were not the same. The cause of action in the first suit sprang out of the alleged relations between the plaintiff and defendant as copartners, and was based upon the right which the plaintiff derived from that relation to an accounting and his share of the profits. Here the cause of action is based entirely upon the contract alleged, and the right of the plaintiff to compensation under that contract and according to its terms. According to the allegations of the complaint in the first action, the plaintiff was equally interested with the defendant as owner of the property and effects of the firm, and as such had an equal right with him to control and dispose of the same. According to the allegations of the complaint in this action, he did not own any of the property or assets of the business and had no right to dispose of the same, and was only entitled to his compensation to be measured by the profits. The same evidence would not sustain the two actions. To maintain the first action it was necessary to establish the copartnership. To maintain this action it was necessary to establish the agreement employing the plaintiff and fixing his compensation.

While the court in the first action could probably have permitted the plaintiff so to amend his complaint as to conform it to the proofs, and so as to enable him to recover a share of the profits as a compensation for his services, it was not bound to do so, and he had no absolute right to such an amendment. It cannot, therefore, be said that this cause of action could have been litigated, tried and determined in the former action. The

Opinion of the Court, per EARL, J.

plaintiff was there defeated because he misconceived the form of his action — not because he did not have a meritorious claim to the profits he was seeking to share in.

A few rules as to the effect to be given to former recoveries may be stated thus: One shall not be twice vexed for one and the same cause, and an allegation of record upon which issue has been taken and found is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties from again litigating the fact once so tried. But in order to bar the second action, the circumstances must be such that the plaintiff might have recovered in the first for the same cause alleged in the second. The estoppel of an adjudication made on grounds purely technical and where the merits could not come in question is limited to the point actually decided, and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first. When a suit fails in consequence of a want of jurisdiction, or because the plaintiff misconceived the remedy, or did not bring the proper parties before the court, and not from any inherent defect, the substance of the cause is left at large, and may be made the subject of another action. To render a judgment effectual as a bar, the cause of action must be substantially the same; that is, it must be sustained by the same evidence, although the form of the suit may be different. (2 Smith's Lead. Cas., Hare & Wall. notes 783, 784, 786.) In *Harding v. Hale* (2 Gray, 399), in an action for goods sold, the defendant answered that he had, in part payment of the price, given a special promise to pay certain debts of the plaintiff, and had performed that promise, and that he had otherwise paid the remainder of the price; and it was held that a judgment for the defendant in that action was not a bar to a subsequent action on the special promise. The judge writing the opinion said: "It would seem to be plain, therefore, that the judgment in the first suit constitutes no bar to the maintenance of this action. The first suit was not for the same cause of action, nor to be supported by the same evidence as the second. The judgment in the first did not negative the cause of action relied

Opinion of the Court, per EARL, J.

upon in the second, but affirmed its existence and pointed the way to a better writ." In *Norton v. Husley* (13 Gray, 285), it was held that a verdict and judgment for the defendant in an action of contract upon his promise to accept an order drawn upon him in favor of the plaintiff, brought by one who had assigned to the plaintiff an unfinished contract of work for the defendant, are no bar to an action of tort by the plaintiff against the defendant for inducing the plaintiff to take such assignment by false and fraudulent representations as to the amount remaining due from the defendant to the former contractor. The judge writing the opinion said: "The principle is well settled that a judgment in a former suit between the same parties is a bar to a subsequent action only when the point or question in issue is the same in both. The judgment is conclusive in relation to all matters in the suit which were put in issue; but has no effect upon questions not involved in it, and which were not then open to inquiry or the subject of litigation. * * * It is true that both originated in the same series of transactions, and in the conversations and communications which took place between the parties concerning them; but the result of the former suit shows that the plaintiff there wholly mistook the effect of what was said by the defendant, and so failed to establish the claim which he then attempted to enforce." In *Stowell v. Chamberlain* (60 N.Y. 272), it was held that in order to make a former action a bar, the circumstances must be such that the plaintiff might have recovered in the first action for the same cause of action alleged in the second; that it is not enough that the transactions involved in and giving rise to the two actions are the same; and that to make a judgment for defendant, in an action for the wrongful conversion of property, a bar to a subsequent action of *assumpsit* to recover the value of the same property, it must appear that the question of plaintiff's title was passed upon in the first action.

It is not sufficient to establish the identity of the two causes of action, that the plaintiff was seeking in both actions to recover the same amount of money, or even the same damages.

Opinion of the Court, per EARL, J.

It is well settled that one may sue to recover damages for fraudulent representations upon a sale of property, and if he fails to establish the fraud and is defeated upon that ground, that he may subsequently bring an action for breach of warranty based upon the same transaction and the same representations and to recover precisely the same damages. In one case the action is based upon tort, and in the other upon contract, and the causes of action are not identical and could not be sustained by the same evidence. So a party may sue in an action of trover to recover the value of property, and being defeated in that action on the ground that there was no wrongful conversion, he may sue to recover the value of the same property upon the theory of a sale. The damages sought to be recovered in each action, to-wit: the value of the property, would be the same, and yet that does not determine the identity of the causes of action. Proof of the compensation agreement alleged in this action would not have been sufficient to maintain the first action based upon the partnership agreement. The first action established conclusively that there was no partnership agreement between the parties, and both parties were estopped by that adjudication from again alleging that there was

The objection is now made that the proof upon the trial of this action was not sufficient to establish the compensation agreement alleged in the complaint and found by the referee. We have carefully looked into the evidence and are satisfied that there was enough to justify the findings of the referee. It is possible to hold that the former adjudication established that there was this compensation agreement. It is undisputed that these services were rendered under some agreement, and if it was not a partnership agreement, then it must have been under some agreement for compensation. What that agreement was has been found by the referee upon sufficient evidence.

Upon the trial, the defendant claimed credit for certain sums of money paid by him as gratuities to the architects having charge of the work performed; and the referee held that he was not entitled to those credits. The referee did not find, and

Opinion of the Court, per EARL, J.

was not requested to find, the facts in reference to those items, and the evidence in reference to them is not very satisfactory or definite. He simply found, as matter of law, that no part of the payments alleged by the defendant to have been made to the architects was a proper charge against the plaintiff. We do not determine that such payments could in no case be allowed to one situated like this defendant. They may be made under such circumstances as to make it just and equitable that they should be allowed. Here there was no proof or finding that they were beneficial to these parties, or that they were necessary payments, or justifiable upon business principles. We cannot, therefore, say that the referee erred in disallowing them.

The defendant also claimed credit on account of two bonds which he took in payment for work done by him. He knew at the time he took them that they were worthless, and yet he claims credit for them as a loss, and insists that they should be deducted from his profits. The party from whom he took them was abundantly able to pay the amount, and he was under no obligation to take them. He took them after the relations between him and the plaintiff had terminated, without any consultation with him, and without his knowledge, and we think the referee did not err in refusing to allow him a deduction on account of them. While the defendant under his contract with the plaintiff was entitled to manage the work in his own way and as he thought was most conducive to his interests without consulting the plaintiff, yet he was bound to act in good faith. He had no right, as against the plaintiff, to throw away profits upon some remote idea that in some way it might be for his interest to do so. The taking of these bonds in no way benefited the plaintiff. They were taken after the contract was fully performed and after the obligation to pay on the part of the contractor had fully matured. The contractor was abundantly able to pay, and there was no evidence even that he refused to pay the money; and the taking of the bonds seems to have been a gratuitous act on the part of the defendant for the purpose of aiding and relieving the contractor from

Statement of case.

whom he took them. His benevolence should not be visited as a loss upon the plaintiff.

Many other exceptions appear in the record, to some of which our attention has been called in the brief submitted by the learned counsel for the appellant. We have carefully considered them all and do not think they point out any error, or require any particular notice.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

KINGS COUNTY FIRE INSURANCE COMPANY, Appellant, v.
HANNAH STEVENS, Respondent.

101	411
184	534
101	411
139	408

101	411
168	75

It seems, where no trust is imposed upon real estate which a municipal corporation holds in fee, it may sell and convey without legislative authority.

When authorized by the legislature, the corporation may close a portion of a street, of which it owns the fee, without compensation to owners of lots on the street which do not front upon the portion closed, at least where there is other access to the lots of such owners.

A turnpike road was laid out running east and west across the land of N. in the city of Brooklyn; subsequently the city purchased of the turnpike company a portion of said road, "for a public street," which was thereafter used as a street. The expense of the purchase was assessed upon the adjoining land. N. deeded to S. the land south of the street, bounding it on the north by the south line of the street. S. laid it out into city lots; one of these he deeded to defendant. Of those adjoining on the east, plaintiff became the owner. The commissioners appointed under the act of 1835 (Chap. 182, Laws of 1835) to lay out the streets of the city, with authority to close any street or part thereof, "theretofore laid out and not approved by the mayor and common council of said city," determined to close said street. The proceedings of the commissioners were validated and confirmed in 1839 (Chap. 41, Laws of 1839); subsequently buildings were erected east of defendant's lot, which covered the land formerly occupied by the street, except a passage-way four feet wide, south of the center of the street. Plaintiff having obtained a conveyance of this strip from the executors of N., and from the city, built a fence across it, which defendant, claiming a right of way, tore down. De-

Statement of case.

defendant had access to her lot by a passage-way twelve feet wide, to a street on the west. In an action to restrain defendant from interfering with plaintiff's occupation, *held*, that whether the turnpike company owned the fee or an easement, plaintiff acquired the fee either by the deed from the city or from N.'s executors; that the city, with the authority of the legislature, could close the street, and so far as the *locus in quo* is concerned, could do so without compensation to defendant, and could sell and convey the same; that the street was legally closed; that the description in the deed from N. to S., bounding the land conveyed by the south line of the street, conveyed no private easement but merely recognized an existing public one; that conceding the city was bound to leave open a way by which access could be had to defendant's lot, it was not required to leave more than one; it might choose which of the two to leave, and when it conveyed to plaintiff it made its choice, and plaintiff was entitled to close the one so conveyed.

Story v. N. Y. E. R. R. Co. (90 N. Y. 122), distinguished.

(Argued December 1, 1885; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 11, 1883, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain defendant from entering upon a strip of land to which plaintiff claimed title, and from tearing down fences or other structures erected thereon, which the complaint alleged defendant had done, and threatened to continue to do, under a claim of a right of way over the *locus in quo*.

Under acts of the legislature (Chap. 86, Laws of 1805, and chap. 20, Laws of 1806) the Wallabout and Brooklyn Toll Bridge Company established a turnpike road, known as the Wallabout bridge road, running from the East river, through the city of Brooklyn. It ran through the lands of one Nostrand. In January, 1835, Nostrand conveyed the land south of the road to one Sandford, bounding him on the north by the south line of said road. Sandford caused the land so conveyed to be laid out into city lots; one of these was conveyed in February, 1835, and is now owned by the defendant; five lots lying east and between defendant's lot and Nostrand avenue were also on the

Statement of case.

same day conveyed by Sandford, and are now owned by plaintiff. In September, 1835, the city, under authority of an act of the legislature (Chap. 188, Laws of 1835), purchased the turnpike road; by the said act it was "to remain free to the public as a street," and by the deed it was conveyed "as and for a street." The expense of the purchase was assessed, as authorized by said act, upon the adjoining land. The commissioners appointed under the act, chapter 132, Laws of 1835, to lay out the streets and avenues of the city, determined to close the Wallabout road. Thereupon maps and survey were filed, and their action was "confirmed and declared valid and effectual by chapter 41, Laws of 1839. The various streets and avenues were opened, graded and paved; buildings were erected on the portion of the old Wallabout road lying west of Nostrand avenue, leaving open a passage-way four feet south of the center of the old road. West of defendant's lot is Sandford street; from said lot to the street a passage-way twelve feet wide remains open. Plaintiff obtained from the executors of Nostrand, and from the city quit-claim deeds of the south half of the Wallabout road opposite his lots, and built a fence across the open space; this defendant tore down, and continued to do so as it was rebuilt, claiming a right of way over it.

Further facts appear in the opinion.

William C. De Witt for appellant. The power to discontinue highways without compensation resides, and has always resided, in the legislature. (R. S. [5th ed.], part 1, art. 4, chap. 16, §§ 82, 93, 94, 108, 111, 114, 115, 120, 133; *Thomp. on Highw.* 183; *Jackson v. Hathaway*, 15 Johns. 447; *Bisbee v. Mansfield*, 6 id. 84; *People v. Nichols*, 51 N. Y. 470, 475; *Carris v. Com. of Waterloo*, 2 Hill, 443, 444-5.) The public may make such use of their easement as they choose, or abandon it altogether, and any consequential damages will be irrecoverable. (*Gosler v. Georgetown*, 6 Wheat. 593; *Smith v. Washington*, 20 How. [U. S.] 135; *Wilson v. Mayor, etc.*, 1 Denio, 595; *People v. Kerr*, 27 N. Y. 211, 212, 213; *Metropolitan Board v. Heister*, 37 id. 672; *Zimmerman v. Union Canal*, 1 W. & S.

Statement of case.

346; *Sus. Canal Co. v. Wright*, 9 id. 9; *Tracy v. City of Indianapolis*, 17 Ind. 267; *Matter of Furman St.*, 17 Wend. 649, 655, 656, 659; *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 245; *Kellinger v. Forty-second St. R. R. Co.*, 50 id. 209.) A way of ingress and egress being left open to the defendant's property, the discontinuance of the old road at every other point is, so far as defendant is concerned, valid. (*Fearing v. Irwin*, 55 N. Y. 486; *Coster v. Mayor of Albany*, 43 id. 414, 415; *Smith v. City of Boston*, 7 Cush. 254; *Wheeler v. Clark*, 58 N. Y. 267, 268, 270; *Jackson v. Hathaway*, 15 Johns. 447.) The sovereign, *i. e.*, the people, having, as matter of fact, abandoned the Wallabout road, the land in suit reverted to the plaintiff as owner of the fee. (*Dunham v. Williams*, 36 Barb. 136, 162, 163; *Hooper v. Utica, etc., Turnpike Co.*, 12 Wend. 371; *Heard v. Brooklyn*, 60 N. Y. 242; *Jackson v. Hathaway*, 15 Johns. 447; *St. Vincent Asylum v. Troy*, 12 Hun, 317; *Corning v. Gould*, 15 Wend. 529, 539, 541, 543.) The learned judge at Special Term erred in holding that the defendant had some private right of way over the *locus in quo*, which survived the extinguishment of the public easement. (*Heard v. Brooklyn*, 60 N. Y. 248; *Child v. Starry*, 4 Hill, 374; *Witter v. Harvey*, 1 McC. 67; *Tyler v. Hausnard*, 11 Pick. 194; *Wheeler v. Clark*, 58 N. Y. 267.) Assuming that the lands in suit were taken by the company, either by purchase or condemnation, pursuant to the provisions of the act of 1805, only an easement therein was acquired. (*Dunham v. Williams*, 36 Barb. 136, 160, 161, 162, 163; Laws of 1847, chap. 210, § 30; Laws of 1806, chap. 86, § 1; *People v. Lawrence*, 54 Barb. 589, 618, 619; *The Northern Turnp. Road Co. v. Smith*, 15 id. 355; *Hooker v. Utica, etc., Minden Turnp. Co.*, 12 Wend. 371; *Heard v. Brooklyn*, 60 N. Y. 242; *Matter of John and Cherry Sts.*, 19 Wend. 659, 675; *McMahon v. N. Y. C. R. R. Co.*, 24 N. Y. 658; *Jackson v. Hathaway*, 15 Johns. 447; *Heath v. Barmore*, 50 N. Y. 302; Laws of 1835, chap. 132; chap. 188; Laws of 1839, chap. 141.) The defendant has ample remedy for any damage she may suffer in the closing of

Statement of case.

the Wallabout road against the city of Brooklyn. (*Sage v. Brooklyn*, 60 N. Y. 180; *Hardy v. Brooklyn*, 90 id. 435; *Fitzpatrick v. Brooklyn*, 80 id. 358.)

Jesse Johnson for respondent. The conversion of a turnpike road into a public and open street or highway was valid and effectual. Such proceeding is a mere change of use within the scope of the original acquisition. (*Heath v. Barmore*, 49 Barb. 406, 409; 50 N. Y. 302.) Whenever a lot or plot of land is severed by a grant, which conveys a part, and described a remaining, contiguous and appropriate part as a street or highway, the grant carried with the fee conveyed, an appurtenant right over the appropriate and contiguous land retained. (*Story v. N. Y. E. R. R. Co.*, 90 N. Y. 144, 145; *Taylor v. Hoffer*, 62 id. 649; *Wiggins v. McCleary*, 49 id. 346, 348.) The Wallabout bridge road became a street or highway by virtue of a special assessment laid upon and paid by the lands immediately adjoining. The lands thus charged and that contributed the fund that made the street or highway, thereby obtained a special property therein. (*Story v. N. Y. E. R. R. Co.*, 90 N. Y. 122, 173, 174; *Mahady v. Bushwick R. R. Co.*, 91 id. 153; *People v. Brooklyn F. & C. I. R. R. Co.*, 89 id. 92.) If the lot in question, by paying an assessment, obtained any rights in this road, it obtained just what it paid for; it obtained the right to have this road kept open so as to be a road or highway past this lot. (Hill. on Inj. 314; *Higbee v. C. & A. R. R. Co.*, 19 N. J. 28; *Hartshorn v. Inhabitants of So. Reading*, 3 Allen [Mass.], 501; Girard on City Water Rights and Streets, 145; *Fearing v. Irwin*, 55 N. Y. 496, 490; Wash. on Ease. marg. p. 162-165; *Parker v. Farmingham*, 8 Metc. 200.) Apart from any constitutional question, that the act of 1835 (Chap. 132), did not authorize the closing of this road. (*Matter of Sackett St.*, 74 N. Y. 102.) The land that the turnpike company held, is held in fee, and Nostrand retained no reversionary interest therein. (*Armstrong v. Park Com.*, 45 N. Y. 234; *Heath v. Barmore*, 50 id. 302; *McDonald v. Mayor*,

Opinion of the Court, per FINCH, J.

etc., 68 id. 23; *Starin v. Town of Genoa*, 23 id. 449; *Donovan v. Mayor, etc.*, 33 id. 291.) The new deeds plaintiff relies on were given while there was a clear adverse possession, held and established under an express adjudication. Under such a possession they were clearly in violation of the statute. (2 Edm. Stat. 713, § 6; 4 R. S. 691, § 6.)

FINCH, J. Whether the turnpike company took a fee or an easement, and so, whether the absolute ownership remained in Nostrand as reversioner, or passed to the city of Brooklyn by the conveyance of the company, need not be considered; for the plaintiff holds a deed both from Nostrand and the city, and took the fee by one route or the other. Of course this statement implies that the city could, with the aid of the legislature, close the street without specific compensation to the defendant, and did do so effectually, as against her, so far as the *locus in quo* is concerned; and also that the street being closed, and the land freed from any special trust, the city, if it took the fee, became the owner as if a private person and discharged from any public use, and so could sell and convey it without legislative aid. That the last proposition is correct seems to be clearly intimated in *Brooklyn Park Com. v. Armstrong* (45 N. Y. 234, 243), where it is said that, if the city took the fee of land free from a trust, it could convey when and as it chose, but could only be permitted so to do when a trust existed, by the sanction of the legislature. Except when restrained by their charters or the statute, all corporations have the absolute *jus disponendi* (2 Kent's Comm. 281); and where no trust is imposed upon the property which a municipal corporation holds in fee, it has an inherent right to sell and convey, and needs no legislative aid. (Dill. on Mun. Corp., § 445; *People v. City of Albany*, 4 Hun, 675, 679; *Aiken v. West. R. R. Co.*, 20 N. Y. 370.) The question of title in this case, therefore, ends in one inquiry whether the legislature could and did authorize the closing of the street effectually, as against the plaintiff, without making compensation. That question is settled by *Wheeler v. Clark* (58 N. Y. 267). The effort on the part of the respondent is to distin-

guish that case by insisting upon certain limitations of the general power which were not then in question, but are made applicable by the facts before us. It is claimed that the doctrine of *Story v. N. Y. Elevated R. R. Co.* (90 N. Y. 122) preserved to this defendant as an abutting owner, a property in the street of which she could not be deprived without compensation, and although she held no covenant from the city, yet her land having been assessed for the cost of the street when purchased of the turnpike company, her property right is equally clear and certain. We need not consider or discuss that question, for the closing of the street here in controversy is in front of plaintiff's premises and not of hers, and does not take from her light or air or convenience of access. No right appurtenant to her lot as abutting on the street has been infringed. But it is further said that the conveyance and map of Sandford, from whom she derived title, dedicated the street to open and permanent public use. But he could not dedicate what he did not own. He bought of Nostrand who bounded him by the south line of the street, and neither by act, map or covenant became responsible for the continuance of the street, or forfeited his own right of possible reversion in fee. It is of no consequence what the defendant's right might be as against Sandford or those claiming under him, for it is a right prior and superior to his which the plaintiff owns and is seeking to enforce. It is claimed, however, in avoidance of this difficulty that Nostrand himself, while owner of the fee in the road, conveyed the adjoining property to Sandford, bounding his grant by the south line of the road, and that such reference to it as an open highway estopped him from any act tending to close it and bound him as owner of the fee to keep it open. But that contention is also answered in *Wheeler v. Clark* (*supra*), where it was held that much stronger language merely recognized the public right and bound no one for its continuance. The same doctrine was affirmed in *Jackson v. Hathaway* (15 Johns. 447). The deed conveyed no private easement, but merely recognized an existing public one, which has been lost. It is claimed also that another limi-

tation upon the right of the city, with the sanction of the legislature, to close the street, protects the defendant, and is a prohibition against such complete environment as prevents access to the premises without a trespass. But the proof shows no such state of facts. A means of access remains. The way is open from defendant's premises to Sandford street; a way twelve feet wide; while the one here in question is but four feet in width. The rule preserves access, but does not give two modes of access and a double right of way. The city might choose which to leave, and when it conveyed to plaintiff the fee of the end toward Nostrand avenue, it made its choice to close that part of the street, leaving open the access from Sandford street. Until that is obstructed the defendant is not surrounded by private rights barring access to her property. It is again insisted that the act of the legislature was insufficient to warrant the closing of this street, because the act of 1835 only authorized the commissioners to close roads not approved by the city, and this road, bought of the turnpike company, was approved by the city. But the act of 1839, passed after the commissioners closed this road, validated and confirmed all their acts.

We discover no reason, therefore, for doubting the validity of the action which closed this road at the point in question and toward Nostrand avenue, or for denying plaintiff's title to the land. An assertion of title in the defendant, by prescription, resulting from an adverse user for twenty years or more, appears in the opinion of the General Term. There was no finding of fact by the trial court establishing such adverse user, nor any finding of law that defendant had a right of way over the disputed premises by prescription; nor does the evidence warrant such conclusion. The defendant has been in the occupation of her lot, and her witness, Samuels, of his, only about eleven or twelve years. What their predecessors did or claimed does not appear. It is shown that the present owners filled in and improved the roadway, but before their purchase, the proof is, that it was a hollow occasioned by the higher grade and curbing of Nostrand avenue and filled with water. It is also apparent that structures were built upon the old roadway, without resistance

Statement of case.

from anybody, destroying it utterly, as a street, at its junction with that avenue, and narrowing the possible way to the four feet now in dispute. There is a casual statement of the witness Shiel, who had lived for thirty years on another block fronting the Wallabout road and between Sandford and Walworth streets, that the property-owners on the road had no other way to go in or out "and have used it that way ever since." His statement is not shown to refer to the Nostrand avenue end, and could not have referred to that, for he distinctly says, that after the avenues were built "the surface water came down and filled that place up until these ladies and other folks built between Sandford and Nostrand." We are of opinion that no sufficient evidence was given to warrant a conclusion of title by prescription.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

ELLEN GREANY, Respondent, v. THE LONG ISLAND RAILROAD COMPANY, Appellant.

101	419
124	419
101	419
162	26
101	419
166	286

In an action against a railroad company to recover for injuries sustained at a crossing, where the negligence alleged was the failure to ring a bell or blow a whistle as the train approached the crossing, testimony of passengers on the train, who were in a position to have heard, that they did not hear either of these signals, is competent, although it does not affirmatively appear that they were looking, watching or listening therefor.

Where in such an action there is any evidence, direct or inferential, of care or caution on the part of the person injured, the question as to contributory negligence is for the jury.

While a person approaching a crossing is bound to make all reasonable efforts to see, that a careful, prudent man would make in like circumstances, his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal.

In such an action plaintiff's testimony was to the effect that she lived

Statement of case.

north of defendant's road; she was going south from her home upon a highway which crossed the tracks of said road at a station located south of the tracks. As she approached the crossing, a train going east on the south track stopped at the station; its cars reached across the highway, leaving no room to pass. She stopped for awhile, and then proceeded; she stopped again as she reached the north track; just then the train started up. She testified that as she came up to the track, she looked both ways "along the track, and saw no engine," except that of the train at the station. She took a step or two to cross, and as she did so, saw a train coming from the east on the north track, but so close that she could not escape, and she was struck by it and injured. This occurred in what seemed to the witness not more than a few seconds after she had looked up and down the track. The trains did not usually meet at the station, but the one going east was behind time. On cross-examination the plaintiff testified that if she had looked earlier, she might have seen the train, but did not think there was any need of looking more than once, and did not think there was any other train due at that time; that she had looked a few seconds before, and then went on. The engine at the station was blowing off steam, and she did not hear any bell or whistle from the approaching train. This there was testimony tending to show was running at a dangerous rate of speed. *Held*, that the question of contributory negligence was properly submitted to the jury.

(Argued December 17, 1885; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 11, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for injuries sustained by plaintiff, who was struck by an engine attached to a train on defendant's road, as she was crossing its tracks at a highway crossing.

The material facts are stated in the opinion.

Edward E. Sprague for appellant. The court erred in allowing testimony, as to defendant's omission to sound the whistle and bell, from witnesses who were not in a position to have observed the signals. (*Culhane v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 133; *McKeever v. N. Y. C. & H. R. R. Co.*, 88 id. 667; *Chapman v. N. Y. C.*, 14 Hun, 485; *Tolman*

Statement of case.

v. *S. B. & N. Y.*, 27 id. 325, 327.) Plaintiff should have been nonsuited on the ground of contributory negligence. (*Salter v. U. & B. R.*, 88 N. Y. 42; 75 id. 279; *Adolph v. C. P. N. & E. R.*, 76 id. 535; *Tolman v. S. B. & N. Y.*, 98 id. 198; *Becht v. Corbin*, 92 id. 658; *Connelly v. N. Y. C.*, 88 id. 346; *Byrne v. N. Y. C.*, 83 id. 620; 34 Iowa, 153; 5 Am. R. Rep., 469.)

John Fleming for respondent. It was negligence in defendant not blowing whistle, or sounding bell at crossing. (3 Edm. Stat. [2d ed.] 643; *Renwick v. N. Y. C. R. R. Co.*, 36 N. Y. 132, 133; *Salter's Case*, 59 id. 631; 88 id. 50.) It was negligence of the grossest kind in defendant running a train at high speed over a public highway within a few feet of its depot, while another train having just passed over the highway in an opposite direction was standing at that depot, receiving and discharging passengers, and its engine letting off steam; and when that depot was not the place for the trains of defendant to pass or meet each other, and when defendant omitted to give any signals or warning of the approaching fast train. (*Salter's Case*, 88 N. Y. 50; *Brassels v. N. Y. C. & H. R. R. R. Co.*, 84 id. 274; *Terry v. Jewett*, 78 id. 344; *Smedis v. Rockaway Beach R. R. Co.*, 88 id. 20; *John v. H. R. R. R. Co.*, 20 id. 65; *Renwick v. C. R. R. Co.*, 36 id. 132.) Nor would the ringing of bell or blowing of whistle, or both, relieve defendant under the circumstances disclosed by this case. (*Cordell v. N. Y. C. & H. R. R. R. Co.*, 70 N. Y. 124; *Smedis Case*, 88 id. 20.) Whether plaintiff was guilty of contributory negligence was a question of fact. (*Massoth v. D. & H. C. Co.*, 64 N. Y. 529; *Schwier v. N. Y. C. & H. R. R. R. Co.*, 79 id. 73; *Terry v. Jewett*, 78 id. 342; *Salter v. U. & B. R. R. R. Co.*, 88 id. 50; *Hart v. H. R. R. R. Co.*, 80 id. 622; *Shaw v. Jewett*, 86 id. 616; *Cassidy v. Angeli*, 12 R. I. 447; *Louisville C. & L. R. R. Co. v. Goetz*, 79 Ky. 442; *Mahar v. Grand T. R. R. Co.*, 19 Hun, 32; *Tolman v. Syracuse, B. & N. Y. R. R.*, 98 N. Y. 198.) The plaintiff was not guilty of contributory negligence.

Opinion of the Court, per DANFORTH, J.

(*Johnson Case*, 20 N. Y. 65 ; *Brown Case*, 32 id. 600 ; *Beisigel Case*, 34 id. 622 ; *Mackay v. N. Y. C. R. R. Co.*, 35 id. 79 ; *Ernst v. H. R. R. R. Co.*, id. 9 ; *Eaton v. Erie R. Co.*, 51 id. 544 ; *Roach v. Flushing R. R. Co.*, 58 id. 626 ; *Carr Case*, 60 id. 633 ; *Mahar Case*, 19 Hun, 32 ; *Massoth v. D. & H. C. Co.*, 64 N. Y. 524 ; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 id. 464 ; *Kellogg v. N. Y. C. & H. R. R. R. Co.*, 84 id. 244 ; *Shaw v. Jewett*, 86 id. 616 ; *Barry v. N. Y. C. & H. R. R. R. Co.*, 92 id. 290 ; *Terry v. Jewett*, 86 id. 344 ; *Louisville & Lexington R. R. Co. v. Goetz*, 79 Ky. 442 ; *Wanless Case*, 9 Eng. Rep. [Moak's] 1 ; *Schwieb v. N. Y. C. & H. R. R. R. Co.*, 90 N. Y. 560 ; *French v. Taunton R. R.*, 116 Mass. 537 ; *Detroit & M. R. R. Co. v. Steinberg*, 17 Mich. 99.) There was no error in the court allowing question put to witness as to hearing bell or whistle. (*Salter v. U. & B. R. R.*, 59 N. Y. 631 ; *Renwick v. N. Y. C. R. R. Co.*, 36 id. 132.) The circumstances of the case were such as to make listening for bell or whistle unavailing and to excuse plaintiff's witnesses from listening, or trying to listen. (*Smedis Case*, 88 N. Y. 19.)

DANFORTH, J. The appellant concedes there was evidence upon which the jury might find negligence on its part, but contends :

First. That certain negative evidence from persons who did not affirmatively appear to have been "looking, watching, or listening for the ringing of a bell or sounding of a whistle," was improperly received to prove that those signals were not given ; and *Second.* That the plaintiff should have been nonsuited on the ground of her contributory negligence.

As to the first : It is apparent that the best evidence of the fact in dispute would be the testimony of those persons who on the particular occasion in question had the custody or management of the bell or whistle. They were, however, in the employ of the defendant ; themselves interested in proving that the proper signals were given by those instruments, and the law does not require an adverse party to put his case in the hands of persons having such relations to the transaction.

Opinion of the Court, per DANFORTH, J.

Besides those persons, all others must give evidence secondary in character. One person might be watching the bell — looking at it, or listening for its sound; the value of his testimony would depend upon his nearness to the machine, the accuracy of his sense of sight or hearing, the existence, or force, or direction of the wind, and other causes. Another person might be neither looking nor listening, and yet his position be such, and the circumstances about him so favorable that his testimony would be of equal or greater persuasive power than that of the other. A jury must ascertain. An appellate court cannot say that the testimony of either should be rejected. Nor should a trial judge be required to determine its weight, or the fact which it did, or did not ascertain, if it has any legal effect. No error, therefore, was committed in allowing the witnesses K., T. and R. to testify. They were passengers upon the train causing the injury, were in such position that it would not have been impossible for them to have heard the signal if it had been given. There was also abundant evidence from persons whose attention was directed to the train, to justify a finding that the statutory signals were not given, and the whole was submitted to the jury not only in a manner to which no exception was taken, but upon this point, in the very language suggested by the learned counsel for the defendant, adapted to the occasion from *Oulhane v. N. Y. C. & H. R. R. R. Co.* (60 N. Y. 133), upon which without proper foundation he then relied and now cites. It cannot be so extended as to justify the exclusion of evidence.

As to the second point: It would be error for a trial court to grant a nonsuit if by any allowable deduction from the facts proved a cause of action might be sustained by the plaintiff, and when such ruling has been upheld by reason of the contributory negligence of the person injured, it appeared that such negligence was conclusively established by evidence which left nothing either of inference or of fact in doubt or to be settled by a jury. (*Massoth v. D. & H. C. Co.*, 64 N. Y. 524, 529.) In *Kellogg v. N. Y. C. & H. R. R. R. Co.* (79 N. Y. 72) there was under review a nonsuit directed upon this ground by

the General Term, and we readily granted a new trial upon the applications of principles then declared to have been frequently laid down, and which must now govern. In that case the only negligence of the defendant was the omission to give a signal of the approaching train; the plaintiff came upon the crossing and was struck; a moment before he was seen looking to the north and it was claimed that he ought to have looked also toward the south, and that if he had he would have escaped harm, and it was also claimed that if he had listened he would have heard the approaching train. Referring to the situation of the man and his surroundings, the court (EARL, J.) says: "Whether, under such circumstances, by the exercise of ordinary prudence, he did or could have heard, was a question, upon all the facts proved, for the jury. It is unquestionably true that the deceased was bound to exercise his sight to avoid danger at the crossing. He was not bound to the greatest diligence which he could have exercised in that way; but he was bound to exercise such care as a prudent man approaching such a place would ordinarily exercise for the protection of his life. Did he exercise such care? Or, in other words, was there an entire absence of evidence that he did?" * * * * * "We cannot say that at that particular time he should have looked toward the south. It was for the jury to determine whether he exercised that care which the law required of him. He could probably have avoided the accident by stopping before he passed upon the track. But that is a degree of care not usual even with very prudent persons. It has not been decided by the courts of this State that a person approaching a railroad is bound as matter of law to stop, to avoid the imputation of negligence." And referring to evidence as to the distance at which an approaching train could be seen from various points, the learned judge says: "Such evidence is frequently very reliable and satisfactory. But it is not necessarily conclusive. Such experiments are made when the witnesses are calm and their whole minds, free from any distractions, are intent upon the matter in hand. They cannot be made under the precise circumstances which attended the transaction to be investigated." And to the same effect among re-

Opinion of the Court, per DANFORTH, J.

cent cases is *Shaw v. Jewett* (86 N. Y. 616), where, in answer to the claim that the trial judge erred in refusing to charge the jury "that if they believed that the plaintiff could have seen the train at distance enough from the track to have stopped his horse before reaching the track, his failure to see the train was negligence on his part and he was not entitled to recover," this court held there was no error, saying: "That is not the rule. The plaintiff is not bound to see; he is bound to make all reasonable efforts to see that a careful prudent man would make in like circumstances. He is not to provide against any certain result. He is to make an effort for a result that will give safety; such effort as caution, care and prudence will dictate." I know of no exception to the doctrine that where there is any evidence, direct or inferential, of care or caution on the part of the person injured, the question whether it was in compliance with that rule, is for the jury.

In the case before us the accident happened on the 17th of August, 1882, at about five o'clock in the afternoon, at Richmond Hill, where the defendants had a station, and by which passed two of their tracks running east and west, intersecting a highway running north and south. The station was at this point and on the south side of the track. The plaintiff lived on the north side of the railroad, and at the time in question was going along the highway to a store situated on the south side of the tracks. As she came to the tracks to cross the railroad, she saw a train coming from the west on the southerly track; it stopped at the station to let off passengers, and its cars covered the highway. She stood still, waiting about five minutes for the train to move ahead, but when she reached the track the train was still standing there and she stopped just as it started. She "went to walk across too." She says: "As I came up to the track I stood and looked both ways, and along the track, and saw no engine" other than that of the train from the west. She took a step or two, and just as she did so, saw a train coming from the east on the north track, but it was so close that she could not make her escape. This occurred in what seemed to her not more than a few seconds after she had looked up and down the

Opinion of the Court, per DANFORTH, J.

track. On cross-examination by the defendant's counsel, she says: "When I stepped on the first track I looked both ways and could see nothing, and but a few seconds after that I was struck." I could see no engine, looking either way. The train going west had not then left the station. She says: "It was just in the motion of moving ahead at the time I took a step or two, then I stopped on the north track just by the side of the track." She was not between the rails, but stood by the side of the rail, looking at the train, still at the crossing. Asked by the defendant's counsel: "Q. If you had stepped up by the side of that track and looked up the road, you would have seen the train, wouldn't you?" She says: "I did look up, and saw it too. It was so close by me that I could not possibly make my escape. If I had looked earlier I would have seen it, but I did not think there was any need of my looking more than once, and I did not think there was any other train due at that time. I had looked a few seconds before and then went right on. When I looked I could see about a quarter of a mile. I did not see any train, and then I walked on toward the track, and the train was right upon me before I noticed it." At this time the engine at the depot was blowing off steam, and she heard no bell or whistle from the train coming from the east. According to the defendant's time table these trains should not have met or passed each other at this station, but the train going east was behind time. The engineer in charge of the train going west first saw the plaintiff when six hundred feet distant. Can it be said under these circumstances that she was bound as matter of law to see the incoming train? Was it not rather for the jury to say whether or not she had made the effort which a prudent person would make in like circumstances? I think it was for the jury, for it cannot be said to be impossible for a reasonable person to conclude that the accident was caused by the negligent running of the defendant's train, and not by the omission of a duty, or reasonable care on the part of the plaintiff to avoid the collision. The train was unexpected; it was running, as the jury might find, at a dangerous rate of speed, giving no signals of its approach, while the escape of steam

Statement of case.

and the noise made by the other engine might distract and to some extent divert the attention of the plaintiff, who nevertheless was not heedless, but looked in both directions along the track. Whether she looked exactly at the right moment, or in each direction in proper succession, or from the place most likely to afford information, cannot be determined as matter of law, and whether upon the whole, and in view of all the surrounding circumstances, including the negligent conduct of defendant, she exercised due care, was a question which the trial court could not properly decide for itself, but was bound to submit to the jury as one which they alone could answer.

The judgment rendered upon their verdict should, therefore, be affirmed.

All concur, except RUGER, Ch. J., EARL and FINCH, JJ., dissenting.

Judgment affirmed.

HELEN S. SIMMONS, Respondent, v. JOSEPH W. H. HAVENS,
Appellant.

101	427
140	286
101	427
e170	417
170	421
L170	422

When a deed has been duly acknowledged, although there appears to have been a subscribing witness, it is not necessary to call him for the purpose of proving its execution.

In an action of ejectment, plaintiff claimed title under a deed which she alleged had been executed and delivered to her by her mother, who afterward obtained possession thereof and destroyed it, and then deeded the land to defendant, who had full knowledge of the previous conveyance. Plaintiff proved by several witnesses that she had in her possession a deed purporting to convey the premises, to be executed under seal by her mother, and to be acknowledged before L., a justice of the peace; also that such a deed was delivered to her by her mother, and placed by her in her bureau drawer, from which it was subsequently taken by the mother and burned on account of her displeasure at her daughter's marriage. Plaintiff also proved admissions on the part of defendant that the deed in question had been executed at his suggestion, as claimed by plaintiff; that it was acknowledged before L., and that defendant, with full knowledge thereof, subsequently purchased the property, believing the deed did not amount to any thing, as it was not recorded and had been de-

Statement of case.

stroyed. *Held*, the evidence was sufficient to justify a finding by the jury that the deed to plaintiff was duly executed, acknowledged and delivered.

S., plaintiff's husband, after having testified as a witness in her behalf, that defendant exhibited the deed to him, testified on cross-examination that he asked her to see the deed. He was then allowed to state on re-direct examination, under objection and exception, that before he asked to see the deed, plaintiff told him she had a deed of the premises. *Held* no error.

Plaintiff's mother died before the trial; plaintiff was allowed to testify that she had the deed in her possession, and that the signature thereto was in the handwriting of her mother. *Held*, that this was not a violation of section 829 of the Code of Civil Procedure; that it did not involve a personal transaction between her and her mother, and so, was competent.

Plaintiff was also allowed to testify to conversations between her mother and defendant, in which it did not appear that she took any part. *Held* no error.

(Argued December 15, 1885; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made January 25, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Mem. of decision below, 29 Hun, 119.)

The nature of the action and the material facts are stated in the opinion.

D. Morris for appellant. The defendant having title duly authenticated by written evidence, and being in possession of the lands in suit thereunder, as matter of law, cannot be ejected unless the plaintiff makes a clear case showing the execution and delivery of a prior deed duly acknowledged. (*Metcalf v. Van Benthuyzen*, 3 N. Y. 430; *Edwards v. Noyes*, 65 id. 127; *McPherson v. Rathbone*, 11 Wend. 96; *Jackson v. Waldron*, 13 id. 177; *Moon v. Livingston*, 28 Barb. 543.) Plaintiff failed to prove the execution, delivery, and contents of the alleged deed. (Phillips' Ev. 468, 469; *Gillis v. Snather*, 2 Stark. 460; *Moon v. Livingston*, 28 Barb. 543, 560.) Concede the execution of the deed is proven by legitimate testimony, yet it is of no avail to the plaintiff, or effect against the defendant, a purchaser for value. (1 R. S. [2d ed.]

Statement of case.

689, § 136; *Chamberlain v. Spargur*, 86 N. Y. 603.) The court erred in permitting plaintiff, under an objection and an exception, to testify to the genuineness of her alleged grantor's signature. (Code of Civ. Pro., § 529; *Holcomb v. Holcomb*, 95 N. Y. 316; *Sweet v. Gaw*, 23 Hun, 432; *Haskel v. Benson*, 55 How. 360; *Lewis v. Merritt*, 98 N. Y. 206.) A party has a right to an adjudication upon legal evidence. (*Williams v. Fitch*, 18 N. Y. 551; *Foots v. Beecher*, 78 id. 157.)

Charles S. Baker for respondent. A title to lands, duly authenticated by written evidence, will not be set aside on the assumption of a previously lost conveyance, except upon clear proof of existence and execution of the supposed deed; and so much of its contents as will enable the court to determine the character of the instrument. (*Metcalf v. Van Benthuyssen*, 3 N. Y. 424; *Edwards v. Noyes*, 65 id. 125; *Kent v. Harcourt*, 33 Barb. 491.) When an instrument is prepared upon a printed form, ordinarily used for such a purpose, by a person accustomed to drafting such instruments, a strong presumption is created that the instrument contains all the requirements to embrace the objects intended. (*McDonald v. Winter*, 17 Weekly Dig. 378; *Leland v. Cameron*, 31 N. Y. 115; *Manderville v. Reynolds*, 68 id. 528.) It is not necessary to call the subscribing witness to a deed in case of its loss or destruction of the instrument. (*Estton v. Mitchell*, 26 Mich. 502.) The evidence being sufficient to establish that the deed was acknowledged before a proper officer, it was not necessary to call the subscribing witness. (Laws of 1883, chap. 195, p. 200; *Wood v. Chapin*, 13 N. Y. 509.) The general rule that a party cannot, by proof of contradictory statements made by a witness he has voluntarily called, attack his testimony, but is bound by it, does not govern or apply in those cases where, by statute or the rules of the common law, he is compelled to call him, as in the cases of wills, and in other cases where an attesting witness is required. (*Peebles v. Case*, 2 Bradf. 226, 242; *Bullard v. Pearsall*, 53 N. Y. 230; *Hunter v. Wetsell*, 84 id. 549, 556; *Brown v. Bellows*, 4

Opinion of the Court, per RAPALLO, J.

Pick. 187, 189, 194; *Cowden v. Reynolds*, 12 S. & R. 281; *Sigfried v. Levan*, 6 id. 303, 314; *Conselyea v. Walker*, 2 Denio, 117, 123; *Peebles v. Case*, 2 Bradf. 226; 2 Greenl. Ev., § 443.) Substantially everything having been proved that was necessary to show that the premises had been conveyed to the plaintiff by an instrument valid to convey the title to the premises, and good against everybody except a subsequent grantee with a properly executed conveyance, it was entirely proper to prove the declarations of the grantee and the defendants to corroborate the existence of the conveyance. (*Kent v. Harcourt*, 33 Barb. 491, 495.)

RAPALLO, J. This is an action of ejectment for certain land claimed by the plaintiff to have been conveyed to her by her mother, Jane Haskell, now deceased, in March, 1865, by a deed which is alleged to have been delivered by Jane Haskell to the plaintiff before her marriage to Simmons, but to have been, after its delivery to the plaintiff, wrongfully taken by Jane Haskell from the possession of the plaintiff and destroyed.

The alleged deed was never recorded, and after its alleged destruction Jane Haskell conveyed the same land to Havens, the defendant, who is in possession thereof, but it is claimed that before his purchase he had full notice of the execution of the deed to the plaintiff and of her rights thereunder.

The plaintiff, to maintain the issue on her part, called as a witness her husband, John Simmons, to whom she was married in July, 1865, after the date of the alleged execution of the deed. He testified that before his marriage to the plaintiff, she exhibited to him a deed which purported to have been executed to her by her mother, Jane Haskell; that he read it and it purported to convey the premises in question; that it was dated in March, 1865, and purported to be executed under seal, and to be acknowledged before Edwin Lamport, a justice of the peace, and that there was a subscribing witness to it named Israel H. Arnold. There was evidence of several other witnesses on the part of the plaintiff, to the effect that she had such a deed in her possession and had exhibited it to them.

Opinion of the Court, per RAPALLO, J.

Her sister gave testimony tending to show that this deed was delivered in her presence by Jane Haskell to the plaintiff; that the plaintiff put it in her bureau drawer and kept it there until, immediately after plaintiff's marriage, it was taken therefrom by Jane Haskell and put in the stove and burned, on account of Jane Haskell's displeasure at the marriage of the plaintiff with Simmons. There was also evidence of admissions of Jane Haskell made before her conveyance to Havens, and while she was still in possession, that she had executed the deed to the plaintiff and had destroyed it for the reason above stated. There was also evidence of a meeting at about the time when the deed in question is said to have been dated, at a place called the Norcott House, at which meeting Jane Haskell, Arnold and Lamport and a Mrs. Van Huysen were present, and that a deed was there made out which Jane Haskell afterward stated to Mrs. Van Huysen was a deed of a farm to the plaintiff, which she had executed because the property came from plaintiff's father; that she was his only child, and he intended she should have it, she, Mrs. Haskell, having other children by a former husband, but that if plaintiff should marry Simmons she should never have any of the property, and she, Jane Haskell, would destroy the deed.

Numerous other witnesses testified to admissions of Havens that the deed in question had been executed by Jane Haskell at his suggestion; that it had been drawn by Arnold (who was accustomed to conveyancing), and that it had been acknowledged by Jane Haskell before Lamport, a justice of the peace, and that he, the defendant, purchased the same property from Jane Haskell with full knowledge of the execution of the deed in question to the plaintiff, but in disregard of it because it did not amount to any thing, having never been recorded and having been destroyed. The plaintiff and her sister, to whom she had exhibited it, testified to the signature of their mother, being in her handwriting, but there was no proof of the handwriting of either Arnold or Lamport, other than the admissions of the defendant. Neither Arnold nor Lamport were called to testify on the part of the plaintiff, and the main

Opinion of the Court, per RAPALLO, J.

points argued on this appeal on the part of the appellant are, that the evidence of the execution of the deed was inadmissible until Arnold, the subscribing witness, had been first called, and that the complaint should have been dismissed on that ground, and on the ground that the proof of the execution of the deed was insufficient for the reason that there was no proof that it had been attested by a subscribing witness, or acknowledged.

This motion having been denied, the defendant called Lamport and Arnold who both denied, the one that he had taken the acknowledgment, and the other that he had attested the execution of the deed, or of any deed, from Jane Haskell to the plaintiff. They testified that on the occasion of the meeting at the Norcott House, spoken of in the testimony on the part of the plaintiff, a deed was executed by Jane Haskell and was acknowledged before Lamport, but they denied that it was the deed now in question, and stated that it was a deed of different property, and was a deed from Jane Haskell to the defendant, and that that was the only occasion on which the parties ever met at the Norcott House. Arnold testified that he had, at about the same date, at the request of Jane Haskell, drawn a deed to the plaintiff of the property in controversy, but that he had afterward destroyed it before its execution. The defendant also denied having made the admissions attributed to him.

The plaintiff, in rebuttal, called witnesses to contradict Arnold and Lamport, and such witnesses testified to admissions of Lamport, that he had taken the acknowledgement of the deed from Jane Haskell to the plaintiff, and like admissions of Arnold that he had drawn the deed and attested its execution, Arnold and Lamport having been first examined in respect to such admissions and having denied them. The testimony on these points was very conflicting, but the disputed questions of fact were fairly submitted to the jury and must be regarded as settled by their verdict.

We are of opinion that the admissions of Havens, and the other evidence tending to show that the deed had been executed and had been acknowledged before Lamport, who was conceded to have been a justice of the peace, dispensed with the

Opinion of the Court, per RAPALLO, J.

necessity of proof that it had been attested by a subscribing witness, and were sufficient, if credited by the jury, to entitle them to find that it had been duly executed and acknowledged, and that where a deed of land has been duly acknowledged, it is not necessary, for the purpose of proving its execution, to call the subscribing witness, though there appear to have been one.

Some exceptions were taken to rulings on the trial on questions of evidence, which require notice. Simmons, the plaintiff's husband, after having testified, on his direct examination, to the fact that the plaintiff exhibited the deed to him, testified, on his cross-examination, that he asked her to see the deed. On being recalled by the plaintiff he was allowed to state, under objection and exception, that before he asked to see the deed, and in the same conversation, plaintiff told him that she had a deed of the place. This was merely explanatory of his statement on cross-examination that he asked to see the deed, and added nothing to the force of the testimony he had already given that plaintiff had exhibited the deed to him, and that he had read it, and that it described the land in controversy.

Exception was also taken to the plaintiff being allowed to testify that she had the deed in her possession and that the signature was in the handwriting of her mother. She was not asked, and did not state, from whom she received the deed, and her testimony as to the handwriting or the contents of the deed, did not involve a personal transaction between her and her mother. The plaintiff might have received the deed from some third person. She was also allowed to testify to conversations between her mother and the defendant, at which the witness was present, but it does not appear that she took any part in the conversations, and the objection is answered by the case of *Cary v. White* (59 N. Y. 336).

All the other exceptions are covered by the views we have already expressed.

The judgment should be affirmed.

All concur, except MILLER, J., not voting.

Judgment affirmed.

ORSON C. LINDERMAN, Respondent, v. MARION J. FARQUHARSON, Appellant.

Prior to the passage of the Enabling Act of 1884 (Chap. 881, Laws of 1884), a married woman, who had no separate estate and was not engaged in any separate business, was incapable, by reason of her coverture, of making a contract.

Even where she had a separate estate, a promissory note made by her was open to the defense of want of consideration, although in the hands of a *bona fide* holder for value.

Where, therefore, a married woman, in 1879, voluntarily gave her promissory note for the amount of a claim against her husband, without any request on his part that she should become security for him, and without any consideration, either by way of a transfer of the claim to her or otherwise, and, in an action upon the note, there was no allegation or finding that she had any separate estate; *held*, that want of consideration was a good defense, although plaintiff was a *bona fide* purchaser for value, and although by the terms of the note the same was made a charge on defendant's separate estate.

(Argued December 18, 1885; decided March 2, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the fifth judicial department, made April 20, 1883, which reversed a judgment in favor of defendant, entered upon the report of a referee, and granted a new trial.

The nature of the action and the material facts are stated in the opinion.

George H. Phelps for appellant. The defendant was an entire stranger to the transaction between her husband and his creditor, and her promise embodied in the note was an entirely distinct and independent transaction and was entirely without consideration. (*Cary v. White*, 52 N. Y. 138; *Farnsworth v. Clark*, 44 Barb. 601; Chitty on Cont. 52; 1 Pars. on Cont. 391-2, 496-7; *Ward v. Adams*, 24 Me. 177.) This obligation is not governed by the law-merchant, and therefore the plaintiff, notwithstanding his alleged *bona fide* purchase, stands in the position of the creditor, Lovell, with no superior equities,

Opinion of the Court, per RAPALLO, J.

and the defense of want of consideration, if established, must prevail, as though no transfer had been attempted. (*Loomis v. Rusk*, 56 N. Y. 462.)

Frank Rumsey for respondent. The affirmative allegations in the answer that there was no consideration for the note will not put in issue the contrary allegation in the complaint. (*Fleishman v. Stern*, 15 Weekly Dig. 274.) There was an actual and sufficient consideration of the execution of the note by the defendant. (*Hienman v. Moulton*, 14 Johns. 468.) Looking at the obligation in suit as a collateral security for the payment of the principal debt there is sufficient consideration to support it. (*Grocers' Bk. v. Penfield*, 7 Hun, 281; *Place v. McIlwain*, 38 N. Y. 96; *Thompson v. Grey*, 63 Me. 228; *Mut. L. Ins. Co. v. Smith*, 23 Hun, 535; *Stewart v. McGann*, 1 Cow. 99; *Eling v. Vanderlyn*, 4 Johns. 237; *Todd v. Ames*, 60 Barb. 454; *Manhattan B. & M. Co. v. Thompson*, 58 N. Y. 82; *Penn. Coal Co. v. Blake*, 85 id. 226; *Thompson v. Gray*, 63 Me. 228; *Wheeler v. Slocumb*, 16 Pick. 52; *Boyd v. Freize*, 5 Gray, 554.) The conclusion of the referee that the note in suit was non-negotiable and not governed by the rules of the law-merchant was erroneous. (*Third Nat. Bk. v. Blake*, 73 N. Y. 260; *Woolsey v. Brown*, 11 Hun, 55; *Manhattan B. & M. Co. v. Thompson*, 58 N. Y. 82.) A married woman is liable upon her accommodation indorsement in which her separate estate is charged. (*Corn Exch. Ins. Co. v. Babcock*, 42 N. Y. 613; *Third Nat. Bk. v. Blake*, 73 id. 260; *Bodine v. Killeen*, 53 id. 96; *Ackley v. Westervelt*, 86 id. 448; *Tiemyer v. Turnquist*, 85 id. 516; *Hall v. Wilson*, 16 Barb. 549.) If it should be held that a note in suit is not governed by the law-merchant, the principle of estoppel should apply to it in the hands of the plaintiff. (*Bodine v. Killeen*, 53 N. Y. 96; *Smyth v. Munroe*, 84 id. 354; *Anderson v. Mather*, 44 id. 249.)

RAPALLO, J. This action was brought upon a promissory note dated April 3, 1879, made by the defendant and Frank

H. Farquarson, whereby, for value received, they promised to pay to James Lovell or order, \$800, with use, nine months after date, and made the same a charge on their separate estate; which note was before maturity transferred for value by Lovell to the plaintiff in this action.

The answer admitted the making of the note described in the complaint, but set up, among other defenses, that it was given without consideration.

The referee before whom the issues were tried, found as facts that on the 3d of April, 1879, James H. Farquarson was indebted to James Lovell for corn sold; that James H. Farquarson was the husband of the defendant, and on the day named, being sick, *in extremis*, and unable to converse or transact any business, Lovell came to him with a view of settling up the business between them, and was informed by his wife, the defendant, that his physicians had forbidden any interview, and declined permitting Lovell to see him; that Lovell and Frank H. Farquarson, the son of James H., then looked over the accounts between Lovell and James H. Farquarson and found due to Lovell the sum of \$1,084, for which Lovell requested Frank H. and the defendant to give him their notes, with which request they complied and gave two notes, one of which is the note described in the complaint; that as between Lovell and the defendant, the note described in the complaint was wholly without consideration; that James H. Farquarson died within a few days after the making of the note; that after the making of the note and before it became due, Lovell the payee, sold and transferred it, for value, to the plaintiff without notice of the want of consideration; that at the time the note was made and at the time of his death James H. Farquarson was insolvent.

The referee found as conclusions of law that the instrument described in the complaint was made without consideration and, in the hands of the plaintiff, was not entitled to the benefit of strictly commercial paper, and that the plaintiff was not entitled to recover.

No further findings were requested, and there was no finding

Opinion of the Court, per RAPALLO, J.

and no allegation in the complaint, either that the defendant had any separate estate or that she was engaged in any separate business. In the absence of either of these facts, she was incapable, by reason of her coverture, of making a contract, prior to the passage of the Enabling Act of 1884. (Laws of 1884, chap. 381; *Yale v. Dederer*, 18 N. Y. 265; *S. C.*, 22 id. 450; *Corn Exch. Bank v. Babcock*, 42 id. 613; *Loomis v. Ruck*, 56 id. 462.)

It was only in the cases specified in the statutes of 1848, 1849, 1860, 1862, that married women were, prior to 1884, capable of making contracts or of being sued thereon. But even if the appellant had a separate estate, and that fact had been alleged in complaint, the referee was correct in holding that the instrument described in the complaint was not entitled in the hands of the plaintiff to be treated as strictly commercial paper, and that the defense of want of consideration was open to the defendant as against the plaintiff. (*Loomis v. Ruck*, 56 N. Y. 462.)

It is only where a married woman is carrying on a separate business, that notes given by her could, before the act of 1884, be treated as commercial paper.

The referee's finding that the note was without consideration is not inconsistent with the other facts found by him. The defendant appears to have given the note voluntarily, at the request of Lovell, and merely for the purpose of preventing her husband being harassed, when on his death-bed, by the importunities of a creditor. She simply gave a written obligation to pay a debt of her husband, which she did not owe, receiving nothing in return. The evidence may be resorted to for the purpose of sustaining a judgment, although it cannot be resorted to for the purpose of reversing it, except under special circumstances, which do not exist here, and it appears from the testimony of the defendant that she received nothing, and no promise of any thing, for signing the note; that Lovell did not assign or release any claim he had against her husband. Even if the testimony of Lovell conflicted with this statement, the referee had the right to give credit to the defendant, and his finding

Opinion of the Court, per RAPALLO, J.

of fact that she received no consideration cannot be disturbed, the reversal at General Term not having been made on any question of fact. Even an extension of time is not necessarily to be inferred from merely taking a collateral security payable at a future date. (*Cary v. White*, 52 N. Y. 138.) But here the debtor was not even a party to the transaction, and was, so far as appears, ignorant of it.

The case is not similar to that of *Grocers' Bank v. Penfield* (79 N. Y. 502), where it was held that an accommodation note loaned to the payee for the purpose of enabling him to obtain credit, and without any restriction as to its use, is valid in the hands of an indorsee who received it as security for an antecedent debt. In such a case the existence of the antecedent debt is a sufficient consideration for the transfer, to give vitality to the note. But here there was no indebtedness on the part of the defendant to Lovell, and Farquarson never requested the defendant to become surety for him, and he was not a party to the transaction. She was a mere volunteer, and the case is a simple one of one person volunteering to promise to pay the debt of another, without any consideration and without any relation of principal and surety being established between them. If she had voluntarily paid and extinguished the debt without any request on the part of the debtor, or any circumstance obliging her to pay it, it is difficult to see what recourse she could legally have against him. She might have taken an assignment of the claim, but in that case she could claim only as transferee of the right of the creditor, and not for money paid as his surety.

The order of the General Term should be reversed, and the judgment on the report of the referee affirmed.

All concur.

Order reversed, and judgment affirmed.

Statement of case.

DANIEL A. MORAN, Appellant, v. LONG ISLAND CITY, Respondent.

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119 485

The provision of the Code of Civil Procedure (§ 1778), providing that in an action against a foreign or domestic corporation upon "a promissory note or other evidence of debt, for the absolute payment of money," the plaintiff may take judgment as in case of default, unless defendant serves with its answer or demurrer a copy of an order directing the issue to be tried, etc., applies to a municipal corporation; and this, although by its charter it is authorized to sue and be sued, to complain and defend. Such a provision in its charter confers no special right not common to corporations in general.

Said provision is constitutional.

It seems that the decision of a judge, refusing to the corporation an order for the trial of the issues presented by the answer in such an action, is reviewable on appeal.

Moran v. Long Island City (38 Hun, 122), reversed.

(Argued December 22, 1885; decided March 2, 1886.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made October 30, 1885, which reversed an order of Special Term, denying a motion to vacate a judgment entered herein, and which granted said motion. (Reported below, 38 Hun, 122.)

This action was brought to recover the amount of certain interest coupons attached to bonds alleged in the complaint to have been issued by defendant, a municipal corporation.

The answer denied the issuing of the bonds by defendant; a copy was served upon plaintiff's attorney, but was returned with a notice indorsed thereon, to the effect that it was returned because no order of a judge was served therewith, as required by the Code of Civil Procedure (§ 1778), and thereupon judgment was entered against defendant as by default.

Wm. F. Abbett for appellant. Section 1778 of the Code of Civil Procedure applies to municipal corporations. (Code of Civ. Pro., §§ 431, 525, 1804; *Erkenbrach v. Erkenbrach*, 96 N. Y. 466.) An application to the court to enter judgment was

not necessary. (*Hutson v. Morrisania S. Co.*, 12 Abb. N. C. 278.)

A. T. Payne for respondent. Section 1778 of the Code of Civil Procedure does not apply to a municipal corporation. (*Tyler v. Aetna Fire Ins. Co.*, 2 Wend. 280; *Anonymous*, 6 Cow. 41.) The right of defendant to defend an action is the same right accorded a natural person. (Const., art. 8, § 3; *N. Y. Life Ins. Co. v. Un. Life Ins. Co.*, 88 N. Y. 424; *Wayland v. Tyson*, 45 id. 281; *Thomson v. Erie R. Co.*, id. 468.)

RAPALLO, J. We think that section 1778 of the Code is applicable to municipal, as well as to other domestic corporations. They come within the definition of domestic corporations contained in section 3343; they are treated as included in that term in section 431, which prescribes the manner of serving a summons on a domestic corporation, and the Code expressly specifies which of the provisions relating to actions against corporations shall not be applicable to domestic municipal or political corporations. By section 1804, the provisions of articles second, third and fourth of title II are declared not to apply to such corporations, leaving it plainly to be inferred that the provisions of article first of that title are intended to be applied. Section 1778 is one of the provisions of article first, and the conclusion is irresistible that it was intended to leave it applicable, as its terms import, to all classes of domestic corporations.

The sole ground upon which the order of the Special Term was reversed is stated in the opinion at General Term to have been that section 1778 was not applicable to municipal corporations; but on the present appeal the respondent takes the further ground that section 1778 is unconstitutional, in that it impairs the right of the defendant to defend the action.

The same section was considered by this court in *N. Y. L. Ins. Co. v. Universal L. Ins. Co.* (88 N. Y. 424), and the point was there made by counsel that the section was unconstitutional, but it was not passed upon directly, the case

Opinion of the Court, per RAPALLO, J.

having been decided on another ground. Section 1778 was, however, treated in that case as substantially similar to section 4 of the act of 1825, chapter 325, re-enacted with modifications in 2 R. S. 458, §§ 8 and 9, which authorized judgment to be entered summarily on application to the court, against a corporation, after the return of service of process upon it, in an action upon an obligation for the absolute payment of money, etc., unless it should satisfactorily appear to the court by affidavit that the corporation had a substantial defense upon the merits. This provision has stood for over sixty years without question, and it differs from section 1778 only in the mode of procedure, the result of both provisions being that the court must be satisfied that a good defense exists, before a corporation is allowed to defend an action on an obligation of this description.

The defendant would have the same right to a review of the decision of a judge refusing an order for the trial of the issues, which it would have to review an order striking out the answer as sham, or giving judgment on it as frivolous. We should hesitate to pronounce the provision unconstitutional, after a similar provision has stood, and been acted upon by our courts, for so long a period, as a valid regulation of the right of corporations to defend actions brought against them upon written evidences of debt, and of their right to issue such obligations.

The provision of the charter of the defendant authorizing it to sue and be sued, complain and defend in any court, confers upon it no special right not common to corporations in general. The law in respect to defending actions of this description was substantially the same when the defendant was incorporated, and it cannot set up any right, conferred by its charter, which is not subject to the control of the legislature.

No other point has been raised on the part of the respondent.

The order of the General Term should be reversed and that of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

SICKELS — VOL. LVI.

101 442
109 491THE GERMANIA NATIONAL BANK OF NEW ORLEANS, Respondent,
v. WILLIAM G. TAAKS et al., Appellants.

Where to a promise to accept a bill of exchange is attached a condition precedent, which is a substantive part of the promise, and is so coupled with it as to show that the promisor did not intend to bind himself, except on compliance with the condition, this is not an unconditional promise to accept within the statute (1 R. S. 768, §§ 6, 8) such as will support an action against the promisor as acceptor.

Defendants' firm, doing business in the city of New York, wrote a letter to B. & Co., a firm doing business in New Orleans, which contained this clause: "We are ready to pay your sight drafts on us which you advise us as having been drawn against particularly described shipments to the extent of \$50,000 on account of subsequent remittances." Plaintiff, in reliance upon this letter, purchased of B. & Co. two sight drafts, drawn by that firm upon defendants. They were not accompanied by bills of lading or any advices of shipments, and no such advices were sent to defendants. Defendants refused to pay the drafts. In an action thereon, *held*, that it could not be sustained either as an action upon an acceptance, because the promise was conditional, nor as an action upon the letter, treating it as a general letter of credit, because the condition upon which the liability depended was not performed; that while the letter did not contemplate that drafts were to be accompanied by bills of lading, or were only to be drawn after shipment had been fully completed, the promise was limited to the acceptance of such uncovered drafts as should be drawn on the credit of specific shipments in progress but not completed, of which defendants should be particularly advised before the drafts were presented for payment.

G. N. Bank v. Taaks (31 Hun, 260), reversed.

(Argued January 20, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 18, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 31 Hun, 260.)

The nature of the action and the material facts are stated in the opinion.

Edward Salomon for appellants. The defendants' letter of March 7, 1878, was not an unconditional promise to accept a

Statement of case.

bill before it is drawn, and the trial court erred in holding it to be such. (2 R. S. 768, § 8.) No precise or particular words are requisite to create a condition, it depends upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates. (2 Pars. on Cont. 525; 1 Pars. on Notes and Bills, 301; *N. Y. & Vir. State Stock Bk. v. Gibson*, 5 Duer, 584; *Harrison v. Smith*, 2 Sweeny, 669; *Lowery v. Steward*, 3 Bosw. 505; *Lockwood v. Brownson*, 53 Tex. 523; *Anderson v. Hick*, 3 Camp. 179; *Grant v. Shaw*, 16 Mass. 341.) The promise to pay the future drafts being conditional, the defendants are not liable as acceptors, whether the condition has been fulfilled or not. (1 R. S. 768, § 8; *N. Y. & Vir. State Stock Bk. v. Gibson*, 5 Duer, 574; *Harrison v. Smith*, 2 Sweeny, 669; *Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82, 88; *Shaver v. W. U. Tel. Co.*, 57 id. 459, 463.) No action can be maintained by the plaintiff upon the defendants' letter of March 7, 1878, as a letter of credit. (*Robbins v. Bingham*, 4 Johns. 476; *Walsh v. Bailie*, 10 id. 180; *Birkhead v. Brown*, 5 Hill, 634, 642, 643; *S. C.* affirmed, 2 Denio, 375; *Union Bk. v. Coster's Ex'rs*, 3 N. Y. 203, 214; *Evansville Nat. Bk. v. Kaufmann*, 93 id. 273, 276; *Whitford v. Laidler*, 94 id. 145, 148.) A failure to remit ended or exhausted the credit just as well as the drawing up to the amount of \$50,000, and the promise to pay, even if unconditional, could have no application to drafts drawn after the credit was ended or exhausted. (*Ulster Co. Bk. v. McFarlan*, 5 Hill, 432; *S. C.* affirmed, 3 Denio, 553; *Merch. Bk. v. Griswold*, 72 N. Y. 472, 479.)

Samuel Hand for respondent. Commercial letters of credit should be construed as the parties who act upon them may be reasonably expected to understand them. (*Lawrence v. McCalmont*, 2 How. [U. S.] 450; *Mason v. Pritchard*, 12 East, 227; *Gelpcke v. Quentel*, 59 Barb. 250; 74 N. Y. 599; *Hoffman v. Ætna Ins. Co.*, 32 id. 413; *Barney v. Worthington*, 37 id. 112.) A second letter of credit, addressed to the

Opinion of the Court, per ANDREWS, J.

one for whose benefit it is written, is equivalent to a letter addressed to any one to whom it was shown and who acted upon it. (*Birkhead v. Brown*, 5 Hill, 643; *Union Bk. v. Coster*, 3 N. Y. 203, 214; *Barney v. Worthington*, 37 id. 112; *Shaver v. W. U. Tel. Co.*, 57 id. 468, 469; *Gelpcke v. Quentel*, 74 id. 599; *Parker v. Greeb*, 2 Wend. 545.) Under the letter of credit, the shipment of cotton was not a condition precedent to the defendants' liability, nor was it necessary that drafts should be accompanied when discounted with shipping documents; but the sending of shipping documents within a week was simply a duty of A. Eimer Bader toward the defendants, subsequent to their drawing upon the defendants, and the failure to do so in nowise affected the liability of the defendants to the *bona fide* purchasers. (*Gelpcke v. Quentel*, 59 Barb. 250; 74 N. Y. 599; *Merch. Bk. v. Griswold*, 72 id. 472, 480; *Lawrence v. McCalmont*, 2 How. [U. S.] 445; *Tounsley v. Samral*, 2 Pet. 183.) The letter of the defendants was an unconditional promise to pay, and they are liable thereon as the drafts in suit were actually accepted. (*Merch. Bk. v. Griswold*, 72 N. Y. 476; *Barney v. Worthington*, 37 id. 112; *Bk. of Mich. v. Ely*, 17 Wend. 508; *Ulster Co. Bk. v. McFarlan*, 5 Hill, 432; *Johnson v. Clark*, 39 N. Y. 216; *Gelpcke v. Quentel*, 74 id. 599.)

ANDREWS, J. This action is brought to recover the amount of two sight drafts for \$10,000 and \$15,000, respectively, dated at New Orleans, December 26, 1878, drawn by A. Eimer Bader & Co., a firm engaged in the business of buying and exporting cotton, upon Taaks & Lichtenstein, bankers, in the city of New York. The plaintiff, a banking corporation at New Orleans, purchased the drafts from A. Eimer Bader & Co., on the day of their date, in reliance upon a letter dated March 7, 1878, addressed by Taaks & Lichtenstein to Bader & Co., which had been exhibited to the plaintiff. The drafts were forwarded by the plaintiff to the city of New York, and there presented to Taaks & Lichtenstein for payment, which was refused. The firm of A. Eimer Bader & Co.,

although in good credit when the drafts were drawn, were in fact insolvent. On the next day, December 27, 1878, the principal partner in the firm committed suicide, and the insolvency of the firm immediately became known. The plaintiff claims to recover on two grounds, *first*, that the letter of March 2, 1878, was an unconditional promise by Taaks & Lichtenstein to pay the drafts, whereby, under the statute, they became liable as acceptors, and *second*, that if the letter is not an unconditional promise within the statute, it was a general letter of credit, upon faith of which the plaintiff purchased the drafts, whereby an obligation was created on the part of the defendants to repay the sums advanced by the bank.

The first ground upon which the plaintiff relies depends upon the true construction of the letter of March 7, 1878. Prior to that date there had been some dealings between the firm of A. Eimer Bader & Co., and the defendants, in the purchase by the defendants of the drafts of Bader & Co., drawn against shipments of cotton, and in some cases the defendants had accepted drafts drawn by Bader & Co., for their accommodation. On the 2d of March, 1878, Bader & Co., in a letter of that date, wrote the defendants as follows: "Although the greater portion of our business for this season is finished, and although for this reason the balance of our business will not be so very great, the thought nevertheless occurs to us whether it were not possible to open between ourselves a mutually advantageous arrangement, by which we should forward to you our drafts on Europe, for you to dispose of to the best advantage, and in return reimburse ourselves by drafts on you. One point, however, and that a material one, must not be overlooked, namely, that we are allowed by the buyers of our drafts to draw on account of such sold drafts in order to make advances to factors for cotton bought, but not yet received, or to pay invoices to the factors before the shipment is completed or bills of lading therefor signed. In the majority of cases bills of lading accompany our drafts, to be delivered on acceptance, and we should be pleased to hear what your views are as to such an arrangement." In reply to this letter, the defendants wrote the

letter of March 7, 1878. In that letter the defendants say: "In answer to your favor, we reply that we should be pleased to undertake the negotiation in our market, of your drafts, accompanied with shipping documents for shipments of cotton, drawn on leading houses in London, Paris, Switzerland and Germany. We will credit you with the rate of exchange, which we can procure by our indorsement, and with gold as sold, charging you one-fourth per cent commission. To facilitate our intercourse, we are ready to pay your sight drafts on us, which you advise us as having been drawn against, particularly to be described shipments, to the extent of \$50,000 currency, on account of subsequent remittances, which you would then have to send us within a week, whereupon the credit will be renewed of itself. We charge you seven per cent interest per annum." On the 12th of March, 1878, Bader & Co. acknowledged the receipt of the letter of March 7, 1878, and expressed themselves satisfied with the conditions. The drafts of December 26, 1878, in question, had no bills of lading attached, nor were they accompanied with any advice of shipments, but in a letter from Bader & Co., to Taaks & Lichtenstein, written on the same day, after referring to some prior shipments promised, which had been delayed, they said: "We beg you to take note of five hundred bales more for reimbursement at sixty days on London bankers, with the shipment of which we are at present engaged. We have telegraphed for names of bankers, but expect they will mostly be Huth. We allow ourselves to draw upon you to-day: No. 22,313, \$15,000, in favor of ourselves; No. 22,321, \$10,000, do." The drafts in question are those referred to in this letter, and the paragraph quoted is the only advice of shipments which is claimed to have been made in connection with the drafts. Upon these facts the question arises whether the letter of March 7, 1878, was an unconditional promise to pay drafts drawn by Bader & Co. Unless this question can be affirmatively answered, there can be no recovery in this case, as upon an acceptance of the drafts by Taaks & Lichtenstein, whatever other ground of liability there may be.

Opinion of the Court, per ANDREWS, J.

Under the statute, there must be either an actual acceptance of a bill, or an unconditional promise in writing to accept, to support an action against a party as acceptor. (1 R. S. 768, §§ 6, 8.) Section 8, by which the transaction in this case is governed, declares that "an unconditional promise in writing to accept a bill before it is drawn, shall be deemed an acceptance in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration." It is plain, we think, that the letter of March 7, 1878, was not an unconditional promise within this section. The promise of Taaks & Lichtenstein to pay the drafts of Bader & Co., to the amount stated, was coupled with the condition that Taaks & Lichtenstein should be advised by the drawers that the drafts were drawn against "particularly to be described shipments." It cannot be claimed that the drafts contemplated by these letters, were to be accompanied by bills of lading, or were only to be drawn after shipments had been fully completed. Such a construction of the defendants' engagement would be inconsistent with the purpose of the arrangement entered into between the parties. The proposition of Bader & Co., in their letter of March 2, 1878, was modified before acceptance by Taaks & Lichtenstein in their letter of March 7th. They required that the foreign drafts to be negotiated by them should be accompanied with shipping documents, and the request of Bader & Co. to be allowed to draw for advances to factors for cotton bought, but "not yet received," and to pay invoices to factors "before the shipment is completed, or bills of lading therefor signed," was only assented to in part by Taaks & Lichtenstein. They did not consent to make advances to pay for cotton bought by Bader & Co., but not delivered, but only to accept drafts against particularly to be described shipments, of which they should be advised by Bader & Co. It was the evident purpose of the arrangement finally consummated between Bader & Co. and the defendants, that Taaks & Lichtenstein should accept drafts not accompanied by bills of lading; but it is equally clear upon the face of the correspondence that their undertaking was limited to the ac-

Opinion of the Court, per ANDREWS, J.

ceptance of such uncovered drafts as should be drawn on the credit of specific shipments in progress, but not completed, of which they should be particularly advised before the drafts were presented for payment, and for which Bader & Co. were to send remittances within a week. By this course of business Bader & Co. were put in funds to complete the shipments in progress, and Taaks & Lichtenstein, while not having at the time bills of lading to secure their advances, had the assurance of Bader & Co., that they had cotton on hand, or immediately available, in progress of shipment, out of which reimbursement would be made. It is apparent that this was an important and substantial condition, coupled with the defendants' promise. It was, as claimed by the learned counsel for the defendants, to some extent, a guaranty of the good faith of Bader & Co., and though when performed it would not operate as a legal pledge of the cotton for the security of the drafts, it placed Bader & Co. in a situation where they could not in honor divert the cotton from that purpose, and where if the advice was fraudulently given, they would be exposed to serious consequences. What constitutes an absolute, unconditional promise to accept a bill, within the statute, has been considered in several cases. It is well settled that it is not necessary that there should be a promise to accept in express terms. An authority to draw, or a promise to pay, a bill to be drawn, is regarded as equivalent to a promise to accept. (*Ulster Co. Bk. v. McFarlan*, 5 Hill, 432; *Barney v. Worthington*, 37 N. Y. 112.) So, also, restrictions as to the time or amount, do not prevent the promise from being treated as unconditional and absolute as to drafts within the limitation. (*Bank of Michigan v. Ely*, 17 Wend. 508; *Ulster Co. Bk. v. McFarlan*, *supra*.) It is also held that an authority given to an agent to draw "from time to time, as may be necessary in the purchase of lumber," or as "you want more funds," operates simply as an instruction to the agent, and does not, as to persons dealing with him in good faith, constitute a condition. (*Merchants' Bank v. Griswold*, 72 N. Y. 472; *Bank of Michigan v. Ely*, *supra*.) The party dealing with the agent, may rest upon his represen-

Opinion of the Court, per ANDREWS, J.

tation, express or implied, that the draft is in the business of the principal, or that the funds are needed, and he is protected although it turns out that the representation is false. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Merchants' Bank v. Griswold*, *supra*.) But where the condition is a substantive part of the promise, and is a precedent one, and is so coupled with the promise as to show that the promisor did not intend to bind himself, except on compliance with the condition, it is impossible in that case to regard a promise to accept, as an unconditional promise within the statute. This was, we think, the character of the promise in this case. The bank, when it took the drafts in question, was informed by the letter of March 7th, that the acceptances to be made by Taaks & Lichtenstein thereunder, were for the accommodation of Bader & Co. The condition of their promise to pay, was plainly written on the face of the letter. It was material, and could not be waived by Bader & Co. The condition not having been complied with, no obligation rested upon the defendants to accept or pay the drafts.

Having reached the conclusion that the defendants are not liable as acceptors, the question remains whether they are liable to refund the money advanced on the drafts, treating the letter of March seventh, as a general letter of credit. It is denied by the defendants that it possesses the characteristics of that species of commercial instruments. We think it unnecessary to enter into this controversy, for assuming that it was a general letter of credit, open for acceptance by any person to whom it might be presented by Bader & Co., as a ground of credit, it nevertheless amounted simply to a contract on the part of Taaks & Lichtenstein, to pay advances made in conformity therewith. They had a right to stand upon the very terms of their contract, and they were not bound, unless the condition upon which their obligation depended, was fulfilled. The language of Lord MANSFIELD in *Mason v. Hunt* (1 Doug. 297) is equally applicable to this case. Speaking of an agreement to accept, he said: "But an agreement to accept is still but an agreement; and if it is conditional, and a third party takes the

Opinion of the Court, per ANDREWS, J.

bill, knowing of the condition annexed to the agreement, he takes it subject to such condition. (See, also, CHURCH, Ch. J., in *Merchants' Bk. v. Griswold*, 72 N. Y. 479.) It is scarcely claimed, that the general notice in the letter of Bader & Co., of December 26, 1878, that they were engaged in the shipment of five hundred bales of cotton, was a notice of "particularly to be described shipments," required by the letter of March seventh. There was no name of any ship, or of any consignee, and it gave no such information as was contemplated by the parties, and, as the sequel showed, no shipment was in fact in progress. The bank omitted to procure a letter of advice to accompany the drafts, which, if it had done, would have protected it, although the advice was false in fact.

In neither aspect, therefore, can the action be maintained. Not as an action upon an acceptance, because there was no acceptance in fact, and the promise was conditional, nor as an action upon the letter, treating it as a general letter of credit, because the condition upon which the liability depended was not performed.

It is claimed that the defendants by their letter of December 25, 1878, in answer to the letter of Bader & Co., of October 22, 1878, waived the condition as to advice, contained in the letter of March seventh. We think this claim is untenable. Bader & Co. in their letter of October twenty-second, expressed the hope that in exceptional cases, the defendants would not insist upon a strict fulfilment of the condition that their drafts should be covered by remittances within a week, assigning the reason that "owing to unfavorable weather, or other unforeseen circumstances," it might be impossible to obtain the shipping documents in the required time. The defendants in their answer said "that in exceptional cases we should meet your wishes in so far that we shall not hold ourselves strictly to the letter." There was no hint in the letter of Bader & Co. of a wish to change the condition that the drafts should be drawn against described shipments, of which the defendants should be advised, and the reason assigned by Bader & Co. for the desired change in the other condition, was entirely consistent

Statement of case.

with the continuance of the condition as to advice. The weather, or other contingencies, might delay shipments in progress when the drafts were drawn, so as to prevent remittances within a week, and the letters related to this contingency only.

We think the judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.

101	451
194	208

PHILLIPS PHENIX et al., Trustees, etc., Respondents, v. MARIA
W. LIVINGSTON et al., Appellants.

The will of W., after directing the payment of debts and expenses, named six persons as "executors of and trustees under" it. A series of separate trust estates were constituted, running for the lives of the specified beneficiaries. Some of these required specific sums to be set apart, others provided for the severance of the trust estates from the general assets, and their management by five of the six persons so named, holding as trustees. A large portion of the trust estate consisted of real estate, and provision was made for partition. Authority was conferred upon the trustees to lease and to sell certain portions, and general authority for the management of the land. The trustees were also empowered, in their discretion, to commit, by revocable power of attorney, the management of certain of the trust estates to the beneficiary. The accounts of the executors as such were settled, leaving in their hands only the trust estates, which were severed from the general assets, and thereafter separate accounts were kept with each beneficiary. *Held*, that by the will the testator contemplated and provided for two separate duties to be performed by his representatives, first as executors, and thereafter as trustees, and that they were entitled to commissions in both capacities, but that they were not entitled to commissions on the value of the real estate unsold at the termination of the trusts.

Wagstaff v. Lowerre (23 Barb. 209), questioned.

In re De Peyster (4 Sandf. Ch. 511, 512), *McWhorter v. Benson* (1 Hopk. 28), distinguished.

(Argued January 21, 1886 ; decided March 2, 1886.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 22, 1882, which affirmed, so far as appealed from, a judgment entered upon the report of a referee. (Mem. of decision below, 28 Hun, 629.)

This action was brought by plaintiffs as surviving trustees under the will of Stephen Whitney, deceased, for settlement of their accounts.

The appeal was from that portion of the judgment fixing the compensation of plaintiff.

The material facts are stated in the opinion.

J. Frederic Kernochan for appellants. Plaintiffs were not entitled to receive a second commission upon the capital of the estate. (*Drake v. Brice*, 5 N. Y. 430; *Valentine v. Valentine*, 2 Barb. Ch. 430; *Lansing v. Lansing*, 45 Barb. 182; *Holly v. L. G.*, 4 Edw. Ch. 284; *Mann v. Lawrence*, 3 Bradf. 424; *Matter of Carman*, 3 Redf. 46; *Ward v. Ford*, 4 id. 34; *Laytin v. Davidson*, 29 Hun, 622; *Matter of Jackson*, 32 id. 200; *Meeker v. Crawford*, 5 Redf. 450; *Hall v. Hall*, 78 N. Y. 535; *Hurlburt v. Durant*, 88 id. 121; *Johnson v. Lawrence*, 95 id. 154.) There can, in no case, be a paying over from one as executor to himself as trustee. (*Judson v. Gibbons*, 5 Wend. 224; *Hartnett v. Wandell*, 60 N. Y. 346.) The duties so assumed are continuous and not successive as is shown by the fact that he may be removed as trustee before his executor's duties are completed. (*Quackenboss v. Southwick*, 41 N. Y. 117.) A mere separation of funds in the same hands does not entitle one to commission, otherwise a commission might be claimed on each reinvestment of capital. (*Matter of Kellogg*, 7 Paige, 267; *Johnson v. Lawrence*, 95 N. Y. 154.) There can be no compensation awarded to a trustee (where the instrument creating the trust is silent as to compensation) except the compensation under the statute; *i. e.*, a percentage upon the sums of money (or their equivalent) received and paid out. (*Matter of Carman*, 3 Redf. 46; *Hall v. Hall*, 78 N. Y. 535; *Hurlburt v. Durant*, 88 id. 121.) Where one holds real estate, as trustee for the life of another, inasmuch as he never holds the fee

Statement of case.

but merely the life estate, the basis for determining his compensation must be the value not of the fee but of such life estate. (*Embury v. Sheldon*, 68 N. Y. 234-5; *Betts v. Betts*, 4 Abb. N. C. 147; *Newell v. Nichols*, 75 id. 78.) In the case at bar there was no constructive paying out, as there certainly was no actual paying out of the value of the fee to the grandchildren. (*Manice v. Manice*, 43 N. Y. 303.) Where there was no power of sale the analogy of a specific devise is applicable, as the fee itself was never administered upon by the trustees. (*Schenck v. Dart*, 22 N. Y. 420; *Burtis v. Dodge*, 1 Barb. Ch. 77.)

William B. Ross for respondents. Compensation by way of commissions has been properly awarded to the trustees under the trusts created by the eighth, ninth, and thirteenth clauses of the will, upon the personal property and the value of the real property as proven adjudged to constitute such trust shares respectively. (*Valentine v. Valentine*, 2 Barb. Ch. 430; *Drake v. Price*, 5 N. Y. 430; *Hall v. Hall*, 78 id. 535; *Hurlburt v. Durant*, 88 id. 122; *Johnson v. Lawrence*, 95 id. 154; *Laytin v. Davidson*, id. 263; *In re Mason*, 98 id. 527, 536; *McWhorter v. Benson*, Hopk. 28, 42; *Wagstaff v. Lowerre*, 23 Barb. 209; *Matter of DePeyster*, 4 Sandf. Ch. 512; *Matter of Edw. Schell*, 53 N. Y. 565; *Cox v. Leggett*, 18 Hun, 19; *Matter of Moffatt*, 24 id. 327; *Innes v. Parcel*, 2 T. & C. 538; *Savage v. Sherman*, 24 Hun, 311; 87 N. Y. 287; *Matter of Allen*, 96 id. 327; *Biddle's Appeal*, 83 Penn. St. 340; Story's Eq. Jur., § 1268, note; 2 Perry on Trusts, § 918; 1 R. S. 729, §§ 60, 61; id. 730, § 67.) A trustee is entitled to commissions upon the capital of the trusts although he transfers to the beneficiaries, or new trustees the entire stocks and securities which came into his hands at the outset of the trust. (*Matter of Moffatt*, 24 Hun, 327; *Ogden v. Murray*, 39 N. Y. 202; *Matter of Mason*, 98 id. 536.) The amount of property held in trust is the proper basis of allowance to the trustee; and, there is no well-founded distinction between lands and stocks as to the trustee's compensation.

Opinion of the Court, per FINCH, J.

(*McWhorter v. Benson*, Hopk. 28, 42; *Cox v. Leggett*, 18 Hun, 17; *Ward v. Ford*, 4 Redf. 47; *Matter of Moffatt*, 24 Hun, 310; *Matter of Roosevelt*, 5 Redf. 623; 87 N. Y. 287; *Biddle's Appeal*, 83 Penn. St. 340; Story's Eq. Jur., § 1268, note.)

FINCH, J. There are but two questions in this case, and both may be considered without reviewing the complicated details of the trust accounts. These questions are whether the executors who were also trustees became entitled to commissions in both capacities; and if so whether the trustees' commissions are to be computed upon the value of the real estate. The first of these questions must be answered by subjecting the facts established to the test of the rules adjudged in *Johnson v. Lawrence*, (95 N. Y. 154), and *Laytin v. Davidson* (id. 263). In the first of these cases double commissions were refused, for the reason that the will contemplated no separation of duties on the part of the executors, and no transfer to or holding by them of any portion of the estate in the character of trustees; while in the second, double commissions were allowed upon the ground that the will did contemplate a severance of duties and a point of time at which those of the executors would be ended and those of the trustees begin. In that case the severance of the trust funds from the general assets contemplated by the will had taken place; so much of the estate as was needed for debts, legacies and expenses had been to those purposes appropriated; and the balance having been ascertained by a settlement of the executors' accounts became and was adjudged to constitute a trust fund to be further held and managed as such. Within the doctrine of these cases commissions in both capacities were properly allowed in this. The will contemplated a severance of duties and a point of time when that severance should take place. At the beginning of the instrument after directing the payment of debts and expenses the testator names six persons "executors of and trustees under this my last will and testament." They were first to act as executors of the will and then as trustees under it. A series of separate trust estates are then

Opinion of the Court, per FINCH, J.

constituted, running for the lives of specified beneficiaries. Some of them required specific sums to be set apart, and others and more important ones provided in very careful detail for a severance of purely trust estates from the general assets and their further management and administration not by the executors but by five out of the six of them holding as trustees. Since a serious portion of the trust estates consisted of real property, provision was made for a suitable partition for the purposes of the trusts, and a broad and abundant authority given for the management of the lands. The trustees were empowered to lease the improved property for a period not exceeding five years, and that which was unimproved for not more than twenty-one years. Authority was conferred to sell the lands in other States, the unimproved property in this State, and the dwelling-house with the consent of the widow; and the trustees were authorized to rebuild structures destroyed or impaired and erect new buildings upon unimproved property so as to render it productive. A further provision of the will is quite significant. The trustees are empowered in their discretion, through the agency of a revocable power of attorney, to commit the management of certain of the trust estates to the beneficiary, but preserving in themselves the title and resuming control whenever they should deem it advisable. It is impossible to reflect upon these provisions of the will without a resultant conviction that the testator contemplated and provided for two separate duties to be performed by his representatives; one as executors and the other as trustees; the latter to commence at the termination of the former, and to begin with a severance of the trust estates from the general assets and to be held and managed thereafter by his executors or some among them in the capacity of trustees. Such a severance was in fact made. The accounts of the executors as such were settled, and there was left nothing but the trust estates to be managed for the beneficiaries. Separate accounts were opened with each, and they were held and managed for many years, with a great amount of labor, with a large demand upon the care and patience of the trustees, and with a very heavy burden of re-

sponsibility. We think it was a proper case for the allowance of commissions to the same persons, first in the character of executors and then in that of trustees.

The appellants, however, further insist that the commissions of the trustees should not be computed upon the value of the real estate, and the argument is that commissions are only given upon sums of money or their equivalent received and paid out; that the trustees never received the fee of the lands since that fee vested at once in the grandchildren, the trustees taking only an estate commensurate with their trust which simply terminated and was never transferred or paid over. We think this objection is well founded, and that, as it respects real estate held in trust, the commissions of the trustees are not to be computed upon the value of the land which remains unsold. The office of a trustee was at first deemed honorary, and without compensation, but our statute changed the rule and allowed compensation to executors, administrators and guardians, at a fixed percentage to be computed upon all sums received and paid out. Trustees were not named specifically in the enactment, but they were held to be within the equity of the statute, and entitled to compensation as if included within it. To that we must, therefore, refer, and by that be governed in determining what allowance, if any, is to be made. Sums received and paid out are made the basis of computation. It has, nevertheless, been held that securities received by an executor, and by him turned over to the parties entitled, might be treated as money received and paid out for the purpose of computing commissions. This was itself an extension of the authority of the statute, justified by the consideration that what was accepted as money by the parties interested might well be treated as such for purposes of compensation. But we are asked now to take a step further, and give a new extension to the act, which does violence to its language, and makes land, in no just sense received or transferred, constructively money. The only authority for this doctrine is the case of *Wagstaff v. Lowerre* (23 Barb. 209), and a few cases in the Supreme Court and the surrogate's court in the city of New York, which have followed

Opinion of the Court, per FINCH, J.

it as authority. *Wagstaff v. Lowerre* was a Special Term decision. It cited, as authority, but two cases, neither of which justified the conclusion reached. In one of them (*Matter of De Peyster*, 4 Sandf. Ch. 511, 512), the court said, "there is force in the argument that there is no well-grounded distinction between lands and stocks as to the trustees' compensation," but the remark was uncalled for, and unnecessary for the purposes of the decision. The lands there in question had been bid in upon foreclosure of mortgages belonging to the estate and in equity remained personalty, and were therefore treated as such in the hands of the trustees. The other case cited (*Mo Whorter v. Benson*, Hopk. 28, 42), gives no indication that real estate was at all in question, and the elaborate opinion of the chancellor aims only to show that the statute had fixed a definite rate of compensation for an executor's services; a rate computed upon the sums of money received and paid out, and that an allowance of a gross sum was not permissible. *Wagstaff v. Lowerre*, therefore, stood upon no existing authority, and it can have only the force derived from its reasoning. In this court, the question is an open one, and so far as we have been able to ascertain, has never been discussed and decided. We ought not to wander from the statute and strain its construction to an extent approaching perilously near to legislation. In the present case, the fee of the lands it is conceded, vested in the grandchildren by force of the will at the date of the death of the testator. The estate of the trustees took priority, but only for the purposes of the trust. (*Stevenson v. Lesley*, 70 N. Y. 512.) They were authorized to sell and to rent the real estate. Upon all sums of money thus realized and passing through their hands they were entitled to commissions; but the unsold lands, at the close of the trust, passed to the possession of the remaindermen, not through any title derived from the trustees, but by force of the original devise. The trustees transferred no land, but simply refrained from exercising their power of converting it into money. And so they not only never paid it out even constructively by any grant or conveyance, but never even received the absolute fee which all the time was a vested interest in

Statement of case.

remainder. Their estate was simply commensurate with their trust, bounded as to the duration by the terms of the trust, and as to the unsold lands never equalling in value that of the fee. We must, therefore, adhere to the statutory basis of computation and decline to advance further in a construction which steadily departs from a plain and unambiguous enactment having a definite purpose and meaning. If hardship or injustice shall result, of which we are by no means certain, the remedy may be readily applied by further legislation.

So much of the judgment as allows commissions upon the value of the unsold lands should be reversed, without costs to either party.

All concur.

Judgment accordingly.

101	458
133	81
101	458
127	140

CHARLES SNOWDEN et al., Appellants, v. WILLIAM H. GUION,
Respondent.

The "United States Lloyd's" issued an open policy of marine insurance, which became operative only by special indorsement, describing the particular risk assumed. As issued, the underwriters were liable for loss of "animals caused directly by stranding, sinking, burning or collision." This was subsequently modified by inserting after the words "directly by," the words "a sea." Thereafter this indorsement was made upon the policy: "February 16, 1878, steamer *Greece*, New York to London, 188 live cattle; amount insured, \$9,500." The shipment referred to was made February 14. Both parties knew at the time of the indorsement that the cattle were carried between decks. The steamer encountered a severe storm; the waves caused it "to roll tremendously;" the cattle were thrown down violently, and most of them were killed. In an action upon the policy, *held*, that the loss was caused "directly by a sea," within the meaning of the policy, and that the insurers were liable; that the risk contemplated was some effect of "a sea" upon the vessel, the proximate result of which would be a loss to the property insured, and this was not limited to an effect produced by one or more specific and particular waves, as distinguished from the general commotion of the water.

Also *held*, that it was not competent to show by oral evidence that the words "by a sea," were intended to apply only to shipments on deck; that the contract by its terms covered all shipments accepted as risks,

Statement of case.

without regard to the place upon the vessel where the cattle were carried, and it could not be varied by parol.

The policy contained this clause : "The said goods and merchandize hereby insured are valued at ———, as indorsed." The blank was not filled up. It was provided by clauses as follows : "No shipment to be considered as insured until approved and indorsed on this policy by the assurer. * * * Indorsements valued at the same, provided they do not vary from the cost more than ——— per cent." *Held*, that the policy was an open, not a valued one ; that the statements in the indorsement of the sum insured was not a valuation ; and that, therefore, as the loss sustained was more than the amount insured, defendant was not entitled to a deduction for salvage.

Evidence was given tending to show that the surviving cattle were in a weak and dying condition so that a sale was necessary. Defendant's counsel requested the trial court to charge, "that the plaintiffs having shown only a partial loss, and not having given any notice of abandonment cannot recover for a total loss;" this was refused. *Held* no error; that the evidence authorized a finding of an absolute total loss.

Snowden v. Guion (18 J. & S. 137), reversed.

(Argued January 25, 1886 ; decided March 2, 1886.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made March 3, 1884, which reversed a judgment in favor of plaintiffs, entered upon a verdict. (Reported below, 18 J. & S. 137.)

This action was upon an open policy of marine insurance issued by defendant and others, known as the "United States Lloyds." As issued, it contained this clause : "The United States Lloyds, liable only for loss of animal or animals, caused directly by stranding, sinking, burning or collision." Afterward this was changed by inserting after the words "directly by," the words "a sea."

The insurance in question was effected by this indorsement upon the policy :

"February 16, 1878.

"Steamer *Greece*, New York to London, one hundred and eighty-eight live cattle ; amount insured, \$9,500."

The steamer sailed from New York, having the cattle specified on board, shipped between decks. In the course of the voyage the steamer encountered a severe storm. As the captain testified, "a very confused sea," which "caused the ship to roll

Statement of case.

tremendously." The cattle were thrown down, and one hundred and fifty-five of them died from "being bruised and exhaustion."

Plaintiffs' interest in the cattle insured was proved to be \$12,145.98. The cattle which survived and were landed, were in a damaged condition, and were sold for \$1,879.15.

The further material facts appear in the opinion.

Ira D. Warren for appellants. Plaintiffs cannot recover upon the policy unless they show that the water came in direct contact with the cattle and so injured them. (1 Phill. on Ins., § 1099; *Knapp v. Warner*, 57 N. Y. 668; *Stapenhorst v. Wolff*, 65 id. 596; *Clark v. N. Y. L. Ins. Co.*, 64 id. 33.) The words "directly" and "direct" are used by legal writers on marine insurance in the sense of "proximate." (*Tilton v. Hamilton F. Ins. Co.*, 1 Bosw. 378; Phill. on Mar. Ins., §§ 1098, 1129; Arn. on Ins. 664; *Lawrence v. Aberdeen*, 5 B. & Ald. 107; *Gabay v. Lloyd*, 3 B. & C. 793; *Montoya v. London Ass. Co.*, 6 Exch. Rep. 451; *Walker v. Maitland*, 5 B. & A. 171; *Bishop v. Pentland*, 7 B. & C. 219; 1 Phill. on Ins., §§ 1132-1134; *Coyt v. Smith*, 3 Johns. Cas. 16.) The policy in suit is not a valued policy. (1 Phill. on Mar. Ins., § 27; 2 id. §§ 1179, 1180; 1 Arn. on Mar. Ins., § 124, p. 309; 1 Pars. on Mar. Ins. 256; *Wilson v. Nelson*, 33 L. J., Q. B. 220; *Hemmingway v. Eaton*, 13 Mass. 108.) The loss was an actual total loss. (*Am. Ins. Co. v. Carter*, 4 Wend. 53; *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 517; 2 Phill. on Mar. Ins., §§ 1495-6-7; id., § 1487; *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 515; 2 Pars. on Ins. 86; Arn. on Ins. 850.)

Treadwell Cleveland for respondent. Assuming that the words "by a sea" were inserted in the policy at the time the risk was written there was a distinct collateral agreement, made at the time of the agreement, to so change the policy, that the change, when made, should apply only to future shipments on deck, and the loss was, therefore, not within the policy. (*Chapin v. Dobson*, 78 N. Y. 79; *Lindly v. Lacey*, 17 C. B.

Opinion of the Court, per FINCH, J.

[N. S.] 578; Chitty on Contracts [11th Am. ed.], 159; *Pyne v. Campbell*, 6 E. & B. 370; *Wallis v. Littell*, 11 C. B. [N. S.] 369; *Julliard v. Chaffee*, 92 N. Y. 529; *Un. Trust Co. v. Whiton*, 97 id. 172, 178; *Eighmie v. Taylor*, 98 id. 288; *Brigg v. Hilton*, 99 id. 526.) The contracting parties did not intend that the words "by a sea" should cover such a loss as that described in the testimony. (*Knapp v. Warner*, 57 N. Y. 668; *Stapenhorst v. Wolff*, 35 Sup. Ct. [3 J. & S.] 25; affirmed, 65 N. Y. 596; *Clark v. N. Y. L. Ins. Co.*, 64 id. 33; *White v. Hoyt*, 73 id. 508, 511; *Reynolds v. Com. F. Ins. Co.*, 47 id. 604; *Booth v. Cleveland Mill Co.*, 74 id. 21; *Un. Trust Co. v. Whiton*, 97 id. 172, 178.) The action having been brought for a total loss, and the loss being not an actual total loss, but only a constructive total loss, and no notice of abandonment having been given, the plaintiffs cannot recover. (*McCall v. Sun Mut. Ins. Co.*, 34 J. & S. 314; Pars. on M. Ins. 152; 2 Phillips on Ins. 1490-91 and 1535-6; *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342; *McConochie v. Sun Mut. Ins. Co.*, 26 N. Y. 477.)

FINCH, J. The question whether the policy, as modified, by the insertion of the words "a sea," covered the shipment of cattle upon the steamer *Greece*, or took effect only upon later shipments, was one of fact, depending upon the inquiry when the modification was made, and whether before or after the risk by the shipment in controversy was assumed. That shipment was made on the 14th of February, 1878, and the steamer sailed with its cargo of cattle uninsured. An open policy with its blanks unfilled was at that date in the possession of the shippers, but could only become operative by a special indorsement describing the particular risk assumed. The day after the steamer sailed the broker of the shipper called upon the agent of the underwriters, with this open policy in his principal's possession, and in his own a memorandum denominated a "live cattle clause," with a view to procure an amendment of the policy. A live cattle clause had been in the policy during the business of a previous year, but had proved unsatisfactory to the ship-

pers, and the broker's object was to procure its amendment before further insurance was taken. Apparently the parties came to an agreement as to the amendment to be made, for at the close of the conversation, one of the insurer's agents who had listened to it, modified the memorandum by inserting the words "a sea" among the causes of loss by which a liability was incurred, and dating the amendment February 15th. The day following this agreement to modify the terms of the open policy an application was made and accepted to insure the cargo of the *Greece*. How soon the words of modification were actually written in the open policy is somewhat uncertain, but upon the facts, the question was submitted to the jury whether the cargo of the ship was insured under the policy as it stood before the alteration, or as it was modified, and with their verdict in favor of the latter conclusion we must be content.

The proposition that the added words applied only to shipments on deck, and did not cover the risk in controversy, because the cattle were transported between decks, is answered by the finding of the jury that the cargo was insured under the modified policy, both parties well knowing that the cattle were carried under deck. And it encounters the further difficulty of attempting to contradict and modify the written contract by parol evidence. We have so recently considered this subject, and pointed out the difference between proof which alters the terms of the contract itself, and that which leaves it to stand unchanged, but establishes an additional and collateral agreement that we need not prolong the discussion. (*Chapin v. Dobson*, 78 N. Y. 74; *Eighmie v. Taylor*, 98 id. 288.) The contract, as put in writing, covered by its terms all shipments accepted as risks, without regard to the place upon the vessel in which the cattle were carried. It purported to insure the safe transportation of one hundred and eighty-eight cattle upon the steamer, and that shipment was covered by the risk according to the terms of the contract. The parol proof seeks to establish the exact contrary, and to show that the shipment specified in the indorsement, was not covered by the risk because the cattle were placed between decks. The proof tended to

Opinion of the Court, per FINCH, J.

modify the contract itself, to limit and restrain the legitimate scope of its meaning, and not to prove a new and collateral agreement consistent with its terms.

Nor can we dismiss this appeal upon the ground that the new trial awarded by the General Term may have been granted upon questions of fact, for, although a motion for a new trial was made at the Circuit and denied, no order was, in fact, entered from which an appeal could be taken, and the General Term held accordingly that the facts were not before them for review.

We are obliged, therefore, to meet the two final questions upon which the judgment against the insurer was reversed; and these are the true construction of the words, "by a sea," as used in the contract, and the inquiry whether the policy was or was not a valued policy. The words to be construed are susceptible of two meanings, the one general, and the other restricted and particular. "A sea" may mean a general disturbance of the surface of the water occasioned by a storm, and breaking it up into the roll and lift of waves following or menacing each other. When a captain reports that on a particular day he encountered a heavy sea, he uses a natural and appropriate expression, which we are not liable to misunderstand. If he says that a gale came from a particular direction, and raised a sea which delayed his progress, he properly describes the general disturbance of the water consequent upon a storm. On the other hand, if he reports that in a gale a sea carried away his boats, and another swept a seaman overboard, we understand him in each instance to refer to some particular wave or surge, separate from its fellows, which worked its own peculiar and special destruction. The latter is substantially the meaning of the phrase adopted by the General Term, while the former was the construction of the trial court. In his charge to the jury, the learned judge assumed such first construction as the true meaning of the phrase, and submitted the question whether the animals died from bad ventilation and foul air consequent upon the enforced closing of the hatches, or from the heavy sea which threw them down and inflicted mortal injuries. The verdict of

Opinion of the Court, per FINCH, J.

the jury established the latter as the cause of the loss under the construction adopted by the court, but if that was wrong, the verdict may have been a consequence of the error.

Since the phrase inserted was thus ambiguous, we are at liberty to resort to the surrounding circumstances in aid of its interpretation. Before the words "a sea" were added the policy insured only against a loss occasioned "directly by stranding, sinking, burning or collision." These causes of loss evidently contemplate injuries to the ship which occasion as proximate consequences the death of the animals carried. If the ship strands, or sinks, is burned or collides with another vessel or some fixed obstruction, that has happened from which, if the animals die, the loss falls upon the insurer. When among these risks of the vessel another risk is placed, it must naturally mean also, a cause of loss from something which again has happened to the vessel. As it respects cattle carried between decks, where single waves could not reach them, it is clear that nobody contemplated, as a peril to be insured against, the direct impact of such a wave upon the animals, killing them by force of a blow which it could not directly strike, or by submersion in the water which would rapidly run from the decks. The risk contemplated was some effect of "a sea" upon the ship which among its proximate results should cause the death of the cattle. Both parties knew, when this particular risk was accepted, that the cattle were shipped between decks, and the modification effected by the new words inserted, must have contemplated the possible killing of the cattle by the action of "a sea" upon the ship. The jury found that such outward force applied to the vessel directly occasioned the death of the animals, and so the loss was covered by the risk, unless we are further to say that the death of the animals must be traced to the effect upon the vessel of one or more specific and particular waves as distinguished from the general commotion of the water. The ship rocked and pitched in the storm. That could be anticipated and the risk of resultant injury insured against. But the effect of any one wave upon the violent motion of the vessel could by no possibility be separated from the concurring

agency of others, nor could any two or any fifty. Some one or more might be remarkable for size or force, but no man could measure their share in producing the motions of the vessel. It is scarcely reasonable, therefore, to believe that the words "by a sea" meant the blow of one or more particular waves upon the vessel, when loss from a cause so identified was almost impossible, where the cattle were carried between decks and killed by the tossing of the ship. The General Term do not limit the words "by a sea" to a single wave "specifically," but concede that it might mean more than one. If so, how many more, and how are they to be identified as causing that particular rolling of the ship which killed specific animals? A reference to the conversation which culminated in the modification of the contract, does not make the construction of specific and particular waves any easier to adopt, for that respected cattle shipped on deck. As to them, a surge which washed them overboard, or dashed them against each other or fixed parts of the vessel, might be identified, for it would be one which would come upon the ship and sweep its decks; but as to cattle under deck, no such injury could be reasonably contemplated, and that which would enter the minds of the contracting parties would be the tossing of the vessel in a heavy sea, by which the cattle might be thrown from their feet and dashed against the partitions or each other and so killed by "a sea" powerful enough to produce the result. In that conversation the plaintiffs' broker put several supposed cases to the underwriter relative to on-deck shipments, all of which the latter conceded should be covered by the risk. The first was a loss occasioned by the cattle being washed or pushed overboard by the sea, and the second by a sea boarding the vessel and killing the animals on deck. These cases contemplate an injury inflicted by one or more waves producing death differently. In the one the force of the surge sweeps the animal into the water and occasions death by drowning; in the other the same force throws the animal from its feet and dashes it against the deck or fixed obstacles, for the force of the wave alone, in and of itself, would not produce death. But a third case was put and received an equal

assent. The broker suggested "if the animal should die by a collision *by the sea*." That did not mean a collision between a wave and the animals, because that case had just been put and answered. It could only mean a collision of the animal with some fixture or portion of the vessel occasioned by the action of "the sea" upon the ship, instead of a single wave coming on board. Unless it meant that, it was not a third case, but an idle and useless repetition of the second. So that, if we are at liberty to consider this conversation as a means of ascertaining what the parties really meant and intended by the modifying words afterward adopted, we must again believe that a loss occasioned by the motion of the ship struggling with a dangerous sea, and dashing the animals against partitions or each other, was within the intention and contemplation of the parties. The use of the word "directly" does not alter the interpretation. Between the shock of the waves upon the vessel and the death of the animals there was no intervening cause upon the theory involved in the finding of the jury. If a railroad train dashes against an approaching engine and a passenger is killed by being thrown against a seat or side of the car his death is the direct result of the collision, as completely as if the colliding engine had struck him. If in the present case, the storm had compelled the closing of the hatches, and the animals had died from foul air and insufficient ventilation, the loss would have been an indirect result of the heavy sea. But that theory is excluded by the verdict of the jury.

It was further claimed, and the General Term held, that this was a valued policy, establishing the value at the sum insured. In that also we think, they were in error. If this was a valued policy it became so by containing in its terms an agreement of insurer and insured, fixing absolutely for the purposes of the contract the value of the subject insured at the amount insured, If the policy expressed such agreement, and made the value of the cattle identical with the sum insured then since some of them were saved and landed *in specie* at the port of destination, and realized a value, it would follow, as the underwriters claim, that such salvage should be deducted from the insurance,

Opinion of the Court, per FINCH, J.

and the balance only be recovered. The application of the shippers was for a policy valuing the cattle at the sum insured, but the question is what was granted rather than what was asked. The underwriters might still have given an open policy and the insured accept it, and we are to decide upon what was thus given and accepted, possibly taking into account the form of the application if there be ambiguity or doubt. We should naturally look for an agreed valuation in definite language and in the indorsement, since it is that which gives vitality to the policy and is the special repository of the intention of the parties. Usually in a valued policy after the statement of the subject insured the added phrase appears, "valued at _____;" and the blank being filled, the agreed value is settled. (1 Pars. on Mar. Ins. 256; *Hemmingway v. Eaton*, 13 Mass. 108.) In this policy the technical phrase appears, but the blank is left unfilled, and where it appears it evidently contemplates a valuation in the indorsement if none is made in the body of the policy. The clause devoted to that subject provides "the said goods and merchandises hereby insured are valued at *as indorsed*." This means that the property is valued at the sum *stated as its value* in the indorsement, and not at the sum stated as amount of insurance which also appears in the indorsement. The policy remains open if its blank is unfilled and no valuation of the subject insured is specified in the indorsement. In the present case the blank valuation in the body of the policy was left a blank, and no valuation of the cattle was named in the indorsement, but merely the sum insured. That sum, however, it is claimed became the valuation by force of another clause of the policy which reads: "indorsements valued *at the same*, provided they do not vary from the cost more than _____ per cent." Where this phrase occurs in the policy, it follows one which provides: "no shipment to be considered as insured until approved and indorsed on this policy by the assurer," and precedes the one already referred to, which agrees upon a valuation. If the phrase "valued at the same" means at the sum insured then this form of policy is never an open but always a valued policy; and then, too, the subsequent

Opinion of the Court, per FINCH, J.

formal clause "the said goods" * * "are valued at" is superfluous and unmeaning, since already it had been said that the valuation was to be the sum insured. We think the clause relied on has an entirely different purpose and meaning, the force of which lies in the proviso. Its evident aim is to guard against an over-valuation, when it is made effective by filling up its blanks. It means that the property insured is valued "the same" as that value is stated in the indorsement, provided such value does not vary from the cost more than per cent. If a maximum of variation from cost, permissible in the valuation, is agreed upon, that furnishes a protection against an excess which might be in the nature of a wager, and largely exceed the real value. The clause, therefore, does not mean that the sum insured is to be the agreed value, and so in all cases the policy shall be a valued one; but contemplates an agreed valuation which may be stated in the indorsement, and which shall be the agreed value "of the goods, provided they do not vary more than per cent from cost."

We do not concur for the reasons stated with either of the conclusions which led the General Term to a reversal of the judgment, but the respondent further seeks to justify the reversal upon the ground of the refusal of the trial judge to charge "that the plaintiffs having shown only a partial loss, and not having given any notice of abandonment, cannot recover for a total loss." This request assumed that only a partial loss was shown, and as matter of law upon the facts. But there was evidence from which the jury might have found that the cattle surviving were in a weak and dying condition, so that a sale was necessary, and so that there was an absolute total loss rather than a constructive one. (2 Phil. on Mar. Ins., § 1487; *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505, 515.)

The order of the General Term should be reversed with costs, and judgment on verdict affirmed.

All concur.

Order reversed, and judgment affirmed.

Statement of case.

EDWARD MATERNE et al., Appellants, v. BENNO HORWITZ et al.,
Respondents.

Prior to the passage of the Penal Code, which makes it a misdemeanor to sell, or offer for sale, any package of goods falsely marked as to place where manufactured, quality or grade (§ 483), a contract for the sale of goods to be furnished with deceptive labels, intended by the parties and calculated to deceive customers of the purchaser, was against public policy, and the courts will not aid either party to enforce such a contract. Where, therefore, plaintiffs contracted to sell and deliver to defendants domestic sardines with labels upon the boxes representing that they were put up at foreign ports by firms there engaged in the sardine trade, it being known to both parties that the labels were used to deceive the consumers, — *Held*, that plaintiffs were not entitled to maintain an action to recover the contract price for the sardines, which plaintiffs tendered, but defendants refused to accept and pay for.

(Argued February 3, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made at the February Term, 1884, which affirmed a judgment in favor of defendants, entered upon an order dismissing the complaint on trial. (Reported below, 18 J. & S. 41.)

This action was brought to recover the contract price for four hundred cases of sardines.

The following facts appeared. The plaintiffs and defendants were wholesale dealers in sardines. They entered into a written agreement by which the former were to sell and the latter to buy four hundred cases of "domestic sardines," the boxes in the cases to have "fancy labels upon them." Domestic sardines were fish taken and packed in Maine, and "fancy labels" were decorated labels in a French style. The plaintiffs knew that these labels would contain a statement in substance that the contents of the box had been packed in France, in olive oil, by persons named on the label. One of the plaintiffs testified that imported sardines come mostly from France and are worth in the market about fifty per cent more than domestic sardines on account of the quality and the duty. The

Statement of case.

goods tendered by the plaintiffs under the agreement, had upon them labels like those described bearing names that were apparently names of French packers, doing business in France.

It did not appear that there were any persons of that name. Defendants refused to accept or pay for the sardines so tendered.

Charles D. Adams for appellants. To relieve defendants from liability under their contract, it was necessary to prove affirmatively an intent to defraud on plaintiffs' part. (Laws of 1850, chap. 123; Laws of 1862, chap. 162; Laws of 1863, chap. 209; Laws of 1878, chap. 401; *Low v. Hall*, 47 N. Y. 104; *Rudderow v. Huntington*, 3 Sandf. 256.) There being at the time when this contract was made, in 1881, no statute forbidding it, it was a valid contract for the sale of goods, unless it was absolutely void on grounds of public policy, because the goods were in shape to be used, if the vendee saw fit to defraud the public. (*Tracy v. Tulmadge*, 14 N. Y. 162; *Sacketts Harbor Bk. v. Codd*, 18 id. 244.) It is no defense to an action brought to recover the price of property sold, that the vendor knew it was bought for an illegal purpose, provided it is not made a part of the contract that it shall be used for that purpose, and that the vendor has done nothing in aid or furtherance of the unlawful design. (*Gansen v. Tift*, 71 N. Y. 57; *Webber v. Donnelly*, 33 Mich. 172.) The goods plaintiffs tendered were precisely what the contracts called for, and the transaction was not prohibited by law. (*Kreiss v. Seligman*, 8 Barb. 439, 449-50.) On reselling, the plaintiffs acted as agents of the defendants, and were only bound to good faith, and reasonable care and diligence. (*Dustan v. McAndrew*, 44 N. Y. 72, 79; *Smith v. Pettes*, 70 id. 13; *Sherwood v. Ribbons*, 6 Weekly Dig. 231; *O'Brien v. Jones*, 15 J. & S. 67.)

Otto Horwitz for respondents. The enforcement of this contract, whereby the plaintiffs would be enabled to sell the merchandise in question, thus fraudulently packed and labeled, would be against public policy as well as a violation of the statutes, and

Opinion of the Court, per MILLER, J.

will not be enforced by the courts. (3 Barb. 228; *Seneca Co. Bk. v. Lamb*, 26 id. 595; Story on Cont., § 613; *Barton v. Port J., etc., Plank Road Co.*, 17 Barb. 397; *Griffiths v. Wells*, 3 Denio, 226.)

MILLER, J. It must be assumed, we think, that the defendants knew when the agreement was made that they intended to purchase sardines of the kind that were tendered to them, and that the plaintiffs understood that the defendants knew it. It is also inferable that the defendants entered into the agreement, to the knowledge of the plaintiffs, for the purpose of selling the goods to others in the condition in which they were when delivered. It is also evident that the labels were used to deceive the consumers and not the contractors, and to obtain higher prices for the sardines. The plaintiffs procured and furnished the deceptive labels, after binding themselves by contract to do so, and this was done for an unlawful purpose, and with a view of furnishing goods for the market in a condition calculated to deceive the consumers who might purchase them. It is, therefore, apparent that it was part of the contract that an unlawful object was intended, of which both parties were cognizant, and that it was designed by them, under the contract, to commit a fraud and thus promote an illegal purpose by deceiving other parties. In such a case the courts will not aid either party in carrying out a fraudulent purpose.

To carry out this contract would be contrary to public policy, and in such a case, as we have seen, the court will not aid either party.

Under the Penal Code (§ 438), it is made a misdemeanor to sell or offer for sale any package falsely marked, labeled, etc., as to the place where the goods were manufactured, or the quality or grade, etc. The contract in question would seem to be covered by this provision of the Code, but as the Penal Code did not go into effect until May 1, 1882, and this contract was made June 30, 1881, the section cited has, we think, no bearing on the question presented.

The case was properly disposed of upon the ground first

Statement of case.

stated, which is fully considered and elaborated in the opinion of the General Term by SEDGWICK, J., in which we concur.

The judgment should be affirmed.

All concur.

Judgment affirmed.

101	472
154	529

JOHN G. SMITH, Appellant, v. THOMAS BOYD et al., Respondents.

On the same paper, and following the signatures to an assignment for the benefit of creditors, was written a notary's certificate of acknowledgment. It bore the same date as the assignment, and named as the persons acknowledging the ones who apparently executed the assignment. It stated that the persons named were to the notary known "to be the individuals described in, and who executed *the same*." Held, that the words "the same" referred to the instrument to which the certificate was appended, and sufficiently identified it; and that the certificate showed a due acknowledgment of the instrument.

Smith v. Boyd (10 Daly, 149), reversed.

(Argued February 2, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made at the January term, 1884, which affirmed a judgment in favor of defendants, entered upon the report of a referee. (Reported below, 10 Daly, 149.)

This action was brought by plaintiff as assignee for the benefit of the creditors of Clinton H. Smith, to recover for the alleged wrongful taking and conversion of property, part of the assigned estate.

The complaint was dismissed by the referee on the ground that the assignment was not duly acknowledged.

The certificate of acknowledgment was upon the same sheet of paper as the assignment; it bore the same date and followed the signatures of the assignor and assignee. The following is a copy thereof:

Statement of case.

"STATE OF NEW YORK,
City and County of New York, } ss.:

"On this 21st day of February, 1882, before me personally appeared Clinton H. Smith and John G. Smith, to me personally known to be the individuals described, and who executed the same, and who acknowledged to me that they executed the same for the purposes therein mentioned.

"JOHN N. BROWN,
"Commissioner of Deeds,
"New York County."

John J. Adams for appellant. The use by the notary in his certificate of the words "the same," without referring to the assignment, was at most a clerical error, and would not invalidate the assignment. (*Boyd v. Smith*, and *Lien v. Smith*, N. Y. C. P., April 24, 1882; *Meriam v. Harson*, 2 Barb. 232; *Sheldon v. Stryker*, 27 How. 387.) Where the language of an assignment for the benefit of creditors can be abundantly satisfied by a construction which will support the instrument, such construction should be given. (*Benedict v. Huntington*, 32 N. Y. 219; *Bogart v. Haight*, 9 Paige, 297; *Mann v. Whitbeck*, 17 Barb. 388; *Sherman v. Elder*, 24 N. Y. 381; *Kellogg v. Slarson*, 11 id. 502; *Platt v. Lott*, 17 id. 478; *Bk. of Silver Creek v. Talcott*, 22 Barb. 550; *Brain v. Dunning*, 30 id. 211; *Read v. Worthington*, 9 Bosw. 617; *Grover v. Wakeman*, 11 Wend. 187.) The certificate is sufficiently complete to indicate clearly that there was an acknowledgment of the instrument by the parties to it. (*Claflin v. Smith*, 35 Hun, 372, 375.)

Robert Ludlow Fowler for intervening cestuis of plaintiff, appellant. The certificate of acknowledgment was a substantial compliance with the statutes of New York. (Laws of 1877, chap. 466, § 2, as amended; *People v. Collins*, 7 Johns. 554.) If the taking of an acknowledgment be held a judicial act, our statutes of *jeofails* embodied in the present liberal codes of procedure, unquestionably apply to the certificate

Statement of case.

which is a mere official judgment on a state of facts. (Code, §§ 722, 724; *Warner v. Jaffray*, 96 N. Y. 248, 253.) The form of the certificate of the acknowledging officer, not having been prescribed by law, is left to the discretion of such officer by implication and *ex necessitate rei*. (*Ritter v. Worth*, 58 N. Y. 627; *Sheldon v. Stryker*, 42 Barb. 284; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Canandargua Academy v. McKechnie*, 19 Hun, 62.) The judicial presumption is in favor of the sufficiency of an official certificate. (*Hunt v. Johnson*, 19 N. Y. 280, 292; *People v. Snyder*, 41 id. 397; *Carpenter v. Dexter*, 8 Wall. 513, 526; *Kelly v. Culhoun*, 95 U. S. 713; *Morse v. Clayton*, 21 Miss. 373; *Wells v. Atkinson*, 24 Minn. 161.) This is not the case of an instrument with no certificate, but the case of an instrument with a certificate alleged to be defective by reason of the omission of a word. Such an omission may be helped, for any purpose, by a reference to the deed itself, and the missing context supplied by intendment. (*Carpenter v. Dexter*, 8 Wall. 513, 528; *Brooks v. Chaplin*, 3 Vt. 81.) When the omission in a certificate is obviously a mere clerical error the court passes it over, for *de minimus non curat lex*. (*Scharfenburg v. Bishop*, 35 Iowa, 60; *Davar v. Cardwell*, 27 Ind. 478; *Picket v. Doe*, 5 S. & M. 470; 13 Miss. 470; *Samuels v. Shelton*, 48 Mo. 444; *Monroe v. Eastman*, 31 Mich. 283; *Rigler v. Cloud*, 14 Penn. St. 364.)

Otto Horwitz for respondents. An observance of the provisions of the General Assignment Act of 1877 is a prerequisite of the validity of an assignment. (*Britton v. Lorentz*, 45 N. Y. 151; *Jones v. Bach*, 18 Barb. 568; *Board of Education v. Fonda*, 77 N. Y. 357.) As to acknowledgments general assignments are precisely analogous to deeds executed by married women under the statutes which were in existence prior to 1879. (*Jackson v. Stevens*, 16 Johns. 110; *Martin v. Divelly*, 6 Wend. 9; *Gillett v. Stanley*, 1 Hill, 121; *Ryers v. Wheeler*, 23 Wend. 434; *Elwoods v. Klook*, 13 Barb. 50; *Merritt v. Yates*, 71 Ill. 630; *Wetmore v. Laird*, 5 Biss. 160; *Enterprise Transit Co. v.*

Opinion of the Court, per FINCH, J.

Sheedy, 16 Rep. 565; *Jefferson Co. Build. & Loan Ass. v. Hial*, 17 id. 397; *Bk. of Healdeburgh v. Bailhall*, 18 id. 333; *Heaton v. Fryberger*, 38 Iowa, 185; *West Point Iron Co. v. Reginort*, 45 N. Y. 703; *Sheldon v. Stryker*, 42 Barb. 284; *Ritter v. Worth*, 58 id. 627.) The essential parts of an acknowledgment are the identity of the instrument and the acknowledgment of it, and these must be stated in the certificate. (*Bryan v. Ranier*, 8 Cal. 467; *Henderson v. Granele*, id. 581.) It is as incumbent to identify the instrument acknowledged as the parties acknowledging it. (*Merritt v. Yates*, 71 Ill. 636; *Miller v. Lenk*, 2 T. & C. 86; *Fryer v. Rockefeller*, 63 N. Y. 268; *Gillett v. Stanley*, 1 Hill, 121; *Stanton v. Britton*, 2 Conn. 529; *Pendleton v. Britton*, 3 id. 406; *Hayden v. Westcott*, 11 id. 129; *Jackson v. Osborn*, 2 Wend. 555; *Tulley v. Davis*, 30 Ill. 103; *Shepard v. Carriel*, 19 id. 313; *Hardin v. Kirk*, 49 id. 153; *Callaway v. Fash*, 50 Mo. 420; *Wolf v. Fogarty*, 6 Cal. 224; *Hartley v. James*, 50 N. Y. 38; *Norman v. Wells*, 17 Wend. 137; *Smith v. Hunt*, 13 Ohio, 260; *Hess v. McCabe*, 45 Md. 79; *Buell v. Irwin*, 24 Mich. 145; *Spitznagle v. Vauhessh*, 13 Neb. 338; *Lestwich v. Neal*, 7 W. Va. 569.)

FINCH, J. We do not concur in the ruling which destroys the assignment of the insolvents, because of the defect in the notary's certificate of acknowledgment. The criticism of its form has a very perceptible and adequate foundation, when the instrument is read by itself, and with no attending circumstances to solve its ambiguity or give meaning to its words. Whether in the light of those circumstances, and applying the admitted canons of construction, it can be read so as to identify the instrument acknowledged, is the question presented for our determination. If the notary had written, instead of the phrase "the same," where it first occurs in the certificate, the words, "the foregoing instrument," his certificate would have been perfect, and identified the paper acknowledged. It is evident from what he did write, that he intended to certify the acknowledgment of some instrument, the parties to which he

knew, and that they executed it, and were described in it. His certificate appears upon the same paper with the assignment, and following its signatures and bearing the same date. It names, as the persons acknowledging, the two who apparently executed the assignment. The words, "the same," must have some meaning if any just construction can furnish it, for the writer is supposed to have used them for some purpose, and as vehicles of some idea, and not to have written them uselessly or without intelligent meaning. Unless they refer to the assignment, and serve to identify it, they are wholly without force and must be rejected as idle and superfluous. If they have any meaning at all, they must find it in a reference to the assignment immediately preceding, and which alone answers so much of the description as appears. The words are relative, and imply an antecedent which is missing, and without which they are senseless. The result is an ambiguity which often has to be solved with the aid of surrounding circumstances. That the assignors named, executed and acknowledged some instrument in the presence of the notary the certificate assures us. If that instrument was other and different from the one to which the certificate is appended, the words "the same" would be inexplicable. They would prove as indefinite and uncertain as if the phrase had been "*an* instrument," or "*some* instrument," or "*a certain* instrument," which, indeed, is the construction put upon them by the court below. But they are not so indefinite. They imply a known antecedent which the others do not, and assume that the instrument referred to has been in some manner already identified. That manner was only by identity of names and dates, and position upon the same paper with the certificate, and immediately preceding it. To that instrument, and not to some other indefinite one, the words "the same" must refer, or practically be stricken from the certificate as having no purpose or meaning. That we do not unduly strain the language of the certificate by this construction, or indulge a dangerous laxity in the performance of official duty by acknowledging officers, may be made apparent by reference to one or more precedents in the courts of our own State. In *Canandargua Acad-*

emy v. McKechnie (19 Hun, 62, 68), the rule was said to be established that a certificate of proof or acknowledgment need not be in the precise language of the statute, but is to be liberally construed, and is enough if it shows a substantial compliance with the statute. In *Jackson v. Gumaer* (2 Cow. 552), the question arose over the acknowledgment of a mortgage in 1816, under the Revised Laws which required the officer to certify that he knew the person making the acknowledgment to be "the person described in, and who executed" the writing. The officer simply certified that the individual acknowledging was "to me known." On its face, the whole force of the expression established only the fact of a personal acquaintance, and not at all the prescribed fact that he was known to the officer to be the identical person who was described in, and who executed the instrument. The argument was strongly pressed that the omission was fatal. It was urged that the statute was imperative, and its purpose salutary, and aimed at frauds in personating grantors. To which it was replied, that the objection was "hypercritical," and that the phrase "to me known" should be construed as to me known "as a grantor in the deed upon which my certificate is indorsed." Assuredly it is no more difficult to refer the words "the same" in the certificate before us to the paper on which the certificate was indorsed, than to extract from the words "to me known" the further meaning "as grantor" in the deed "upon which my certificate is written." The same construction of the latter phrase was adopted in equity. (*Troup v. Haight*, Hopk. 239), and again in an action at law. (*Duval v. Covenhoven*, 4 Wend. 561.) Less pertinent deviations from the statutory language are found in *Meriam v. Harsen* (4 Edw. 70), and *West Point Iron Co. v. Rymert* (45 N. Y. 703). While we do not underestimate the force of the criticism applied to the certificate before us, we are still of opinion that we ought to construe the ambiguous words in the light of the circumstances, and as referring to the instrument to which the certificate was appended, and as sufficiently identifying it.

Statement of case.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

THE UNITED STATES TRUST COMPANY OF NEW YORK, v. THE
NEW YORK WEST SHORE & BUFFALO RAILWAY COMPANY
et al.

The Act of 1883 (Chap. 378, Laws of 1883), in relation to receivers of corporations, including the second section thereof, in reference to receiver's fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in said section.

The allowance of commissions to such a receiver is governed by the provision of the Code of Civil Procedure (§ 8320), providing for the allowance by the court or the judge where not "otherwise specially prescribed by statute."

(Argued February 9, 1886; decided March 2, 1886.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department made the second Monday of December, 1885, which affirmed an order of Special Term.

This was an action to foreclose a mortgage executed by the railroad company, defendant, upon its property and franchises. Horace Russell and Theodore Houston were appointed receivers of the mortgaged property.

The order appealed from fixed and settled their compensation at \$40,000 each.

Wm. G. Choate and *Elihu Root* for appellants. The provisions of chapter 378, Laws of 1873, extend to all receivers of all corporations. (*Guardian L. Ins. Case*, 93 N. Y. 631; *Clinch v. South Side R. R. Co.*, 1 Hun, 636.) The language of the statute being clear and unambiguous, and there being

101	478
124	338
101	478
148	268
101	478
167	560

Statement of case.

no reason why it should not be interpreted according to the ordinary use of language, it is the duty of the court to give it effect, whatever may be the personal opinion of the judges on the wisdom and policy of the law. (*Jackson v. Lewis*, 17 Johns. 475; affirmed, 18 id. 504; *Pres., etc., of Waterford Turnp. Co. v. People*, 9 Barb. 170; *People v. C. R. R. Co.*, 25 id. 201; *King v. Burrell*, 12 Ad. & El. 468; *Everett v. Wells*, 2 Scott, 531; *Green v. Wood*, 7 Q. B. Rep. 178; *Beebe v. Griffin*, 14 N. Y. 244; *McClusky v. Cromwell*, 11 id. 593, 601; *Wood v. Adams*, 35 N. H. 36; *People v. Green*, 86 N. Y. 318; *Waller v. Harris*, 20 Wend. 561; *Johnson v. H. R. R. Co.*, 49 N. Y. 455; *People, ex rel. Davies, v. Cowlis*, 13 id. 350; Sedg. on Stat. and Const. Law, 187; Cooley's Const. Lim. [5th ed. 201, 202] 168, 169; *Parry v. Edie*, 1 Term R. 313; *James v. Patten*, 2 Seld. 9; *Catlin v. Gunther*, 1 Kern. 368; *People v. Albertson*, 55 N. Y. 50; *License Tax Cases*, 5 Wall. 462; *People v. Purdy*, 2 Hill, 31; *Johnson v. Lawrence*, 95 N. Y. 154, 157.) The court below had, under the provision of this statute, no discretion to fix the fees at a less sum than the statute provides. (*Ex parte Jordan*, 4 Otto, 251; *Halsey v. Van Amringe*, 6 Paige, 12; *Dakin v. Deming*, id. 96; *Meacham v. Stearns*, 9 id. 398; *King v. Talbot*, 40 N. Y. 96; *Hancox v. Meeker*, 95 id. 538; *Hobart v. Hobart*, 96 id. 637.) Each of the appellants is entitled to full commissions upon the receipts and disbursements. (*Brown v. Jarvis*, 2 De G., F. & J. 172; *Washington v. State*, 17 Wis. 148.) The receivers are entitled to the statutory commissions upon the whole amount of their receipts and disbursements, without regard to the particular source of such receipts, or the particular objects of such disbursements. Nor is their right to such commissions affected by the fact that they had an active trust. (*In re Bunch*, 12 Wend. 280.) The word "moneys," and "sums of money" are used as a standard of value or measurement by which to determine the extent of the property passing through the hands of the judiciary officer. (*Wagstaff v. Lowerre*, 23 Barb. 209, 226; *In re De Peyster*, 4 Sandf. Ch. 511; *In re Moffatt*, 24 Hun, 327; *In re Roosevelt*, 5

Statement of case.

Redf. 605; *Laytin v. Davidson*, 95 N. Y. 263; *Hurlburt v. Durant*, 88 id. 121; *In re Bunch*, 12 Wend. 280; *Green v. Sanders*, 18 Hun. 308; *Wood v. Ford*, 4 Redf. 34; *Hovess v. Davies*, 4 Abb. Pr. 71; *In re Kellogg*, 7 Paige, 265; *Hall v. Tryon*, 1 Dem. 296; *Bennett v. Chapin*, 3 Sandf. 673; *In re Morgan's Estate*, 15 Abb. N. C. 198; *Johnson v. Lawrence*, 95 N. Y. 157; *In re Hurlburt*, 89 id. 259.)

Joseph H. Choate for respondents. The second section of the act chapter 378 of the Laws of 1883, does not apply to receivers appointed *pendente lite* in foreclosure suits, but relates only to statutory receivers appointed to wind up a corporation and distribute its assets. (*People, ex rel. Newcomb, v. McCall*, 94 N. Y. 587; Code, §§ 768, 982; *Whitney v. At. & N. Y. R. R. Co.*, 66 How. Pr. 436; High on Rec., § 378; *Metz v. Buffalo, Corry & P. R. R. Co.*, 58 N. Y. 61; *Negus v. City of Brooklyn*, 10 Abb. N. C. 187; *People v. N. Y. & M. B. R. R. Co.*, 84 N. Y. 565; *Donaldson v. Wood*, 22 Wend. 295; *People v. Supervisors of Col. Co.*, 43 N. Y. 135.) The act of 1883 having no application to the case, and there being no other statute specially prescribing these receivers' fees, they are necessarily governed by section 3320 of the Code of Civil Procedure, which leave the fees in the sound discretion of the court appointing. (*Gardiner v. Tyler*, 3 Keyes, 505; 1 Kent's Com. 482; *People v. Draper*, 15 N. Y. 558; Potter's Dwar. on Stat. 188; *People, ex rel. Jackson, v. Potter*, 47 N. Y. 375, 379; *People v. N. Y. & M. B. R. R. Co.*, 84 id. 565; *Dur- yee v. Mayor, etc.*, 96 id. 477, 495-496; *Lessee of Brewer v. Blougher*, 14 Pet. 178, 198; *Smith v. People*, 47 id. 330, 336, 339; *People, ex rel. Mason, v. McClave*, 99 N. Y. 83, 89; *People v. Supervisors of Col. Co.*, 43 id. 132; *People, ex rel. W. F. Ins. Co., v. Davenport*, 91 id. 11, 18; *People, ex rel. Wood, v. Lacombe*, 99 id. 43, 49; *Smith v. People*, 47 id. 330, 336, 344; *Hayes v. Symonds*, 9 Barb. 260; *People v. Mallory*, 2 Sup. Ct. [T. & O.] 76, 80; *People v. Crissy*, 91 N. Y. 632; *People, ex rel. Kingsland, v. Palmer*, 52 id. 88; *Reiche v. Smyth, Collector*, 13 Wall. 162; *Homer v. The Collector*, 1 id. 486; *Redrock v. Henry*, 106

Statement of case.

U. S. 596; *U. S. v. Claffin*, 97 id. 552.) The act of 1883 cannot be construed to give to receivers in foreclosure suits *pendente lite*, and especially in railroad foreclosures, the compensation provided in the second section of that act for "receivers of corporations," as such an interpretation would lead to most unjust, absurd and mischievous consequences, and cannot, therefore, be sustained. (*L. S. & M. S. Ry. Co. v. Roach*, 80 N. Y. 339, 344; *People v. Lambier*, 5 Denio, 9; *Smith v. People*, 47 N. Y. 330, 336; *People v. Mallory*, 2 Sup. Ct. [T. & C.] 76, 80, 81; *Donaldson v. Wood*, 22 Wend. 395; *People, ex rel. v. Comm'rs of Taxes*, 95 N. Y. 554, 558, 559; *People, ex rel. Wood, v. Lacombe*, 99 id. 43, 49; *Duryee v. Mayor, etc.*, 96 id. 495; *U. S. v. Kirby*, 7 Wall. 482, 486-7.)

E. W. Paige for N. Y., W. S. & B. R. Co., and Ashbel Green, as receiver, respondents. Messrs. Russell & Houston were not "receivers of corporations" within the meaning of chapter 378 of the Laws of 1883. (*Whitney v. N. Y. & A. R. R. Co.*, 66 How. Pr. 436, 445.) They were appointed receivers of the specific property described in the mortgage only, *i. e.*, the West Shore railroad, and not of any other property. (*Foster v. Townshend*, 68 N. Y. 203, 206; *Keeney v. Home Ins. Co.*, 71 id. 306, 401; *Hollenbeck v. Donnell*, 94 id. 342, 347.) The statutes on the subject show that by the phrase "receiver of a corporation," as used in the acts of 1880, 1881, 1882, 1883, is meant a receiver who has the powers conferred by the Revised Statutes upon a receiver's appointment in the case of the voluntary dissolution of a corporation. (*Hollenbeck v. Donnell*, 94 N. Y. 342; High on Rec., § 288; *Mann, Receiver, v. Pentz*, 2 Sand. Ch. 257, 266; *Verplanck v. Mer. Ins. Co.*, 1 Ed. 84, 88; *Bangs v. McIntosh*, 23 Barb. 591; *Howe v. Denel*, 43 id. 504; *Belmont v. Erie R. Co.*, 52 id. 637; *Att'y-Gen. v. Utica Ins. Co.*, 2 J. C. 271; *Att'y-Gen. v. Bk. Niagara*, Hopk. 354, 598; Laws of 1825, chap. 325; Code of Civ. Pro., §§ 1784-5, subd. 4; 2 R. S. 463, part 3, chap. 8, tit. 4, § 36; 2 R. S. 469, §§ 67, 68; *Kincaid v. Dwinella*, 59 N. Y. 548; *People, ex rel. Garling, v.*

Van Allen, 55 id. 31, 38.) Section 2 of chapter 378 of the Laws of 1883, relates only to receivers having the powers conferred by the Revised Statutes upon receivers appointed upon the voluntary dissolution of a corporation. (*People, ex rel. Newcomb, v. McCull*, 94 N. Y. 587, 590; *Dwarris, Potter's ed.*, 253, 255, 270; *Rex v. Morris*, 1 B. & A. 441.)

ANDREWS, J. The Code of Civil Procedure, which was in force when the proceedings in this action were taken, furnishes the general rule governing the allowance of commissions to receivers. It is found in section 3320, which provides as follows: "§ 3320. A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his lawful expenses, to such a commission, not exceeding five per centum upon the sum received and disbursed by him, as the court by which, or judge by whom he is appointed, allows." The judge at Special Term in substance held that this section governed the allowance of commissions in the case, and made an order fixing the commissions of the receivers at a gross sum, less than five per centum upon the sums received and disbursed. The order of the Special Term was affirmed by the General Term, and the only question presented on this appeal, is as to the application of section 3220 to the case of a receiver *pendente lite*, appointed in a foreclosure action, to foreclose a mortgage executed by a corporation. It is plain that the section is applicable to receivers appointed in foreclosure actions, where the mortgagor is an individual. But it is claimed that the case of a receiver appointed in a foreclosure action against a corporation, is taken out of the general rule of law by force of the second section of the act, chapter 378 of the Laws of 1883, and that by that section such a receiver is entitled to a fixed percentage upon receipts and disbursements, which the court is bound to allow, irrespective of any consideration of the character or value of the services rendered. The act of 1883 is entitled "An act in relation to receivers of corporations." The second section, upon which the appellants rely, is as follows: "§ 2. Every receiver shall be allowed to receive as compensation for his services as such receiver,

five per cent for the first \$100,000 actually received and paid out, and two and one-half per cent on all sums received and paid out in excess of the said \$100,000." We have reached the conclusion that the appellants were not "receivers of corporations" within the meaning of the act of 1883, and shall content ourselves with a brief statement of the reasons for our judgment. The power of a Court of Chancery to appoint a receiver *pendente lite*, in foreclosure cases, is a part of its incidental jurisdiction, not depending upon any statute, and which it exercises, whenever by reason of the insufficiency of the security, or other reason, equity requires that the rents and profits of the mortgaged property, pending the litigation, should be impounded and retained, to be applied upon the debt, to be ascertained by the final judgment. (*Hollenbeck v. Donnell*, 94 N. Y. 342.) The receiver by virtue of his appointment, takes possession of the mortgaged property and receives the rents and profits as the officer of the court, but the title to the property is not changed, but remains in the mortgagor until a sale under the decree in the action. (*Keeney v. Home Ins. Co.*, 71 N. Y. 396.) This jurisdiction is not affected by the character of the mortgagor, whether an individual or a corporation. It rests upon grounds quite independent of the character of the parties to the instrument, or the nature of the mortgaged property. But it was held at an early day in this State, that the jurisdiction of chancery did not extend to the sequestration of the property of a corporation by means of a receiver, or to the winding up of its affairs, or to control or restrain the usurpation of franchises by corporate bodies, or by persons claiming without right to exercise corporate powers. (*Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371; *Attorney-General v. Bk. of Niagara*, Hopk. 354.) The refusal of the Court of Chancery to entertain jurisdiction of corporate bodies, at the instance of creditors, or to wind up their affairs in case of insolvency, led to the enactment by the legislature in 1825, of the act chapter 325 of the laws of that year, entitled "An act to prevent fraudulent bankruptcies of incorporated companies, and to facilitate proceedings against them," etc. By this act juris-

diction was conferred upon the Court of Chancery to sequester the property of a corporation, upon the application of a judgment creditor, after the return of an execution unsatisfied, and to appoint a receiver of its property (§ 15), and in case of an incorporated bank, which had become insolvent, or had violated its charter, it authorized the Court of Chancery, upon the petition of the attorney-general, or of a creditor, to proceed by injunction and to appoint a receiver of the property of the bank, and to distribute the same among its creditors (§ 17). The provisions of the act of 1825, enlarged and extended, were incorporated into the Revised Statutes, in the article entitled, "Of proceedings against corporations in equity" (2 R. S. 462), and a complete statutory system was enacted for the winding up of the affairs of a corporation against which an execution had been returned unsatisfied, at the instance of the creditor in the execution, and for similar proceedings against insolvent banking or other specified corporations, at the instance of the attorney-general, or any creditor or stockholder (§§ 36, 39, 40, 41). The court was authorized to appoint receivers of the corporate property. Their powers and duties are specified in the statute in great detail, and it is declared that receivers so appointed shall be "vested with all the estate, real and personal, of such corporation," and they are declared to be "trustees of such estate, for the benefit of the creditors of such corporation, and its stockholders." (2 R. S. 469, §§ 67, 68.) The system inaugurated by the act of 1825, and incorporated into the Revised Statutes, has been continued by the Codes, and for fifty years prior to the act of 1883, had been the statutory system of procedure for the winding up of the affairs of insolvent corporations, through receivers appointed by the court, not by virtue of its inherent jurisdiction, but under statutory authority, the statute which authorized their appointment, also prescribing with great minuteness their powers and duties. The immediate point in controversy is, whether the act of 1883, was an additional regulation prescribing the rights and duties of receivers of insolvent corporations, or has a wider

scope, embracing all receivers of a corporation or of corporate property, however appointed, or for whatever purpose the appointment may have been made. We think the limited construction of the statute is the true one, and that the general language of the second section, prescribing the fees of receivers, must, in view of the context, be construed as relating only to receivers of insolvent corporations. The act is made up mainly from the provisions of chapter 537 of the Laws of 1880, and the subsequent amendments of 1881 and 1882 (Laws of 1881, Chap. 639; Laws of 1882, Chap. 331), and those acts expressly related to receivers of insolvent corporations. The first section is new, and in substance is a legislative enactment of the Supreme Court rule No. 81, and prescribes that an application for the appointment of a receiver of a corporation, shall be made in the judicial district in which the principal business office of the corporation is located, or in a county adjoining such district. This section makes no reference to the nature of the proceeding in which the application is made. But a reference to the *ninth* section shows that proceedings against insolvent corporations only were in contemplation. The *ninth* section declares that all applications to the court, contemplated by the act, shall be made in the judicial district where the principal office of the "insolvent corporation" was located. The other sections provide for orders and proceedings of various kinds. If the nature of the proceeding to which the act relates is left indefinite by any of the other sections, the obscurity is removed by the *ninth* section, which shows that the legislature was dealing with insolvent corporations, and that the orders to be made, were in proceedings against such corporations only. The *second* section is the one prescribing the fees. The *third* section provides that the order appointing the receiver shall designate the place of deposit of the funds of the corporation, and that they shall not be deposited elsewhere, except upon the order of the court, on notice to the attorney-general. The application for an order changing the place of deposit must, according to the *ninth* section, be made in the judicial district where the principal office of the "insolvent corporation" is located. The *third* section, therefore, relates to a proceeding

against an insolvent corporation, for it is only in such a proceeding, as appears by the *ninth* section, that an order is contemplated. The *fourth* section makes it the duty of the receiver of an insurance, banking or railroad corporation to make and file periodical accounts every six months, prohibits his paying to any attorney or counsel, any costs, fees or allowances, until the amounts shall have been stated and approved by the court "by an order duly entered," and requires notice of the presentation of any such accounts, to be given to the attorney-general, who is also required to examine the books and accounts of the receiver at least once every twelve months, provisions very appropriate to a receivership for winding up the affairs of a corporation. It is not questioned that the remaining sections of the act, from *five* to *ten*, both inclusive, relate exclusively to proceedings against insolvent corporations. We think the preceding sections relate to the same subject. It is a matter of public notoriety that the act of 1883 was passed, in view of the scandals which had been set afloat, in respect to the administration of the affairs of insolvent corporations through receivers. Omitting the *second* section, it is, we think, reasonably clear that the object of the act was to supplement the existing legislation, in respect to the winding up of the affairs of insolvent corporations, and to provide further restrictions and safe-guards against the misuse or depletion of corporate funds in the hands of the receivers. The *second* section deals with a subject germane to the purpose of the act, and fixes the compensation of the receiver, and when it used the language, "every receiver," it is by the ordinary rules of interpretation and construction of statutes, to be restrained to the particular subject with which the legislature was dealing, and to which the section in question had an appropriate application. (See *Smith v. People*, 47 N. Y. 330; *People v. McClave*, 99 id. 83.)

The conclusion is that the act of 1883, including the second section, relates exclusively to receivers of corporations, appointed in proceedings in insolvency.

The order should therefore be affirmed.

All concur.

Order affirmed.

Statement of case.

CHARLES S. KENNEDY, Respondent, v. THE NEW YORK LIFE
INSURANCE AND TRUST COMPANY, Appellant.

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127	497
101	487
133	61

An affidavit, upon which an order for service of summons by publication under the Code of Procedure (§ 135) was granted, stated that the defendants "cannot after due diligence be found within this State," that they were residents of other States named, and that the summons "was duly issued for said defendants, but cannot be served personally upon them by reason of such non-residence." *Held*, that the affidavit was sufficient to sustain the order and to give the court jurisdiction, at least where collaterally brought in question.

Carleton v. Carleton (85 N. Y. 313), distinguished.

Kennedy v. N. Y. L. Ins. and T. Co. (32 Hun, 35), reversed.

(Argued March 5, 1886; decided March 23, 1886.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 12, 1884, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term. (Reported below, 32 Hun, 35.)

This action was brought to recover damages for an alleged breach of a contract by defendant to sell and convey to plaintiff certain premises.

Defendant acquired title under a foreclosure sale; it was ready and willing to convey, but plaintiff declined to accept a conveyance, claiming defendant's title was defective, in that the summons in the foreclosure suit was served by publication, and that the affidavit upon which the order for such service was made was insufficient to give the court jurisdiction.

R. E. Robinson for appellant. Even statements capable of being construed as allegations of fact would be sufficient for jurisdiction. (*Belmont v. Comen*, 82 N. Y. 256.) If there was any evidence of an attempt to find and serve it was enough to confer jurisdiction. (*Staples v. Fairchild*, 3 N. Y. 41; *Peck v. Cook*, 41 Barb. 549; *Van Wyck v. Hardy*, 39 How. Pr. 392; *Roche v. Ward*, 17 id. 416; *Titus v. Relyea*, id. 265; *Barnard v. Heydrick*, 49 Barb. 62; *Steinle v. Bell*, 12 Abb. Pr. 171; *Howe Machine Co. v. Pettibone*, 74 N. Y. 68; *Wortman v. Wortman*, 17 Abb. Pr. 66.) The recital in the order that the defendant cannot after due diligence be found is *prima*

facie evidence of the existence of such fact. (*Bosworth v. Vandewalker*, 53 N. Y. 597; *Maples v. Mackey*, 89 id. 146.)

Josiah T. Marean for respondent. Non-residence of a defendant does not dispense with effort to find within the State. (*Carlton v. Carlton*, 85 N. Y. 313; Code of Procedure, § 135; *Howe Machine Co. v. Pettibone*, 74 N. Y. 71.) The interpretation of the language of a deposition is a matter of law. (*Bixby v. Smith*, 3 Hun, 63; *Peck v. Cook*, 41 Barb. 549; *Long v. Rogers*, 19 Ala. 321, 331; *Carpenter v. People*, 8 Barb. 610; *Hill v. London G. L. Co.*, 3 Il. & N. 920.)

MILLER, J. The right of the plaintiff to recover in this action depends upon the construction to be placed on section 135 of the Code of Procedure.

In *Carleton v. Carleton* (85 N. Y. 313), upon which the respondent relies, the affidavit stated, "that defendant has not resided in the State of New York since March, 1877, and deponent is advised and believes is now a resident of San Francisco, California," and it was held, that this was not sufficient under the Code of Procedure (§ 135), to authorize the granting of the order; that it was merely an allegation of non-residence, and did not tend to establish that defendant could not, after due diligence, be found within the State.

It will be seen that in the case cited the affidavit as to residence is upon information and belief and does not show positively and distinctly that the defendant was a non-resident. Considerable stress is laid upon this fact, and in the opinion it is said: "Cases may arise where the proof of residence in a distant State at the very time, and of an absolute location there, would be so strong and conclusive as to render it entirely apparent that no act of diligence would be of any avail; and if the affidavit here had stated positively and distinctly that the defendant was at the time not only a resident of the State of California, but was then actually living in that State, there would be ground for claiming that due diligence would be unavailing."

It would thus seem that where the proof of non-residence is clear and conclusive, and that the defendant is living out of the State and in a distant State, there may be strong reasons for holding that proof of due diligence is not required and a different result arrived at.

Opinion of the Court, per MILLER, J.

The case under consideration differs somewhat from *Carleton v. Carleton* (*supra*). The affidavit here states that the defendants "cannot, after due diligence, be found within this State" (they being residents of other States as therein named), and "that the summons herein was duly issued for said defendants, but cannot be served personally upon them by reason of such non-residence." Here is a clear statement that the defendants are non-residents of the State and reside in other and distant States, and that the summons which has been issued cannot be served by reason thereof. This supplies the defect in the affidavit in the case cited in reference to the proof of non-residence and establishes beyond question that fact, making the case considered stronger in this respect than the one cited. The allegation as to non-residence is preceded by the statement that the defendants cannot, after due diligence, be found within this State, which, taken in connection with the subsequent averment as to non-residence, may be considered, we think, as a statement either that an attempt has been made to find the defendants, or at least that they are so remotely located out of the State and have such a fixed residence that it would be impossible after due diligence to find them within the State for the purpose of serving the summons on them.

The statement as to due diligence is not absolutely an allegation of a conclusion of law, or an opinion, but, in connection with what follows, a statement of facts which tend to establish that due diligence has been used.

The two cases are clearly distinguishable, and we think the affidavit here contained allegations sufficient to call upon the judicial mind to determine whether due diligence had been employed to find the defendants, for the purpose of serving the summons issued. In granting the order, the judge so held, and as the language employed will bear this interpretation, the court should not, certainly in a collateral proceeding, determine that the affidavit was entirely defective and set aside the order.

The order of the General Term should be reversed and the judgment of Special Term affirmed.

All concur.

Order reversed, and judgment affirmed.

Statement of case.

101	490
108	509

WILLIAM H. HILLS, Respondent, v. THE PEEKSKILL SAVINGS
BANK et al., Appellants.

In an action by a tax payer of the town of A., to have certain bonds issued by said town adjudged illegal and void, it appeared that the town, acting in supposed accordance with statutory provisions (Chap. 907, Laws of 1869, as amended by chap. 935, Laws of 1871) issued its bonds to pay for stock of a railroad corporation, which passed into the hands of innocent holders. The bonds were claimed by the town to have been illegally issued, and so invalid. While suits were pending to enforce them, said town, under the act of 1890 (Chap. 146, Laws of 1880), authorizing it "to issue new bonds pursuant to the provisions of chapter 73, Laws of 1878," and its amendments, to the amount and extent of its bonded indebtedness, issued the bonds in question in exchange for, and to retire the outstanding bonds, the new bonds drawing a lower rate of interest than the old ones. Said town at the time had no other "bonded indebtedness" than the original bonds issued as above stated. *Held*, that the action was not maintainable; that the town having elected to compromise rather than to contest the validity of the old bonds, was estopped from thereafter questioning it.

The words "bonded indebtedness," as used in said acts of 1878 and 1890, are not limited to bonds in all respects legal and valid, but the acts authorize the refunding of "all municipal bonds save such as" have been adjudged invalid by the final determination of a competent court which are excluded from their operation by chapter 317, Laws of 1878.

The act of 1878 first mentioned, as thus construed, is not violative of the constitutional provision (State Const., art. 8, § 11), prohibiting municipal corporations from incurring indebtedness for other than "county, city, town or village purposes." The said act does not authorize the incurring of an indebtedness, but the payment of an acknowledged debt, and the constitutional provision does not deprive such corporations of the right to compromise claims which they dispute.

The defect alleged in the proceedings under which the original bonds were issued was that to the averment in the petition, that "the signers were a majority of the tax payers of the town, was not added the words 'not including those taxed for dogs or highway tax only.'" *Held*, that the defect did not render the bonds so absolutely void as matter of law, but that there might be reasonable question pending an adjudication; enough of doubt to justify the legislature in authorizing, and the town in effecting an amicable settlement.

People, ex rel. Green, v. Smith (55 N. Y. 135), *Metzger v. A. & A. R. R. Co.* (79 id. 171), distinguishing.

(Argued January 27, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon

Statement of case.

an order made October 19, 1883, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff as a tax payer of the town of Attica, to have certain bonds issued by said town and held by the bank, defendant, adjudged to be void, and to require the said bank to surrender up the same to be canceled, and to restrain said bank from selling or disposing of said bonds, and the defendant Farnham, supervisor of said town, from taking any proceedings to levy a tax to pay interest on said bonds.

The bonds in question were issued and delivered in exchange for, and to retire other bonds issued by said town to pay for its subscription for stock of the Attica and Arcade Railroad Company.

L. W. Thayer & Samuel Hand for appellant. Although the petition did not in express language state that those taxed for dogs and highway taxes only were not included, the language employed does necessarily exclude them, and it is in compliance with the statute in force at the time it was made. (Laws 1869, chap. 907; Laws 1871, chap. 925, § 1.) An assessment made by town commissioners for the performance of highway labor is not a tax, and no person thus assessed can be a tax payer whether he performs the labor or not. (*Sharp v. Spier*, 4 Hill, 82.) The legislature had the power to authorize the new bonds to be issued to pay or return the old ones, and the former were invalid. (*Williams v. Town of Duaneburgh*, 66 N. Y. 129; *Bk. of Rome v. Village of Rome*, 18 id. 38; *Duaneburgh v. Jenkins*, 57 id. 177; *People v. Mitchell*, 35 id. 551.) The plaintiff, as tax payer, cannot maintain the action against the Peekskill Savings Bank. (*Hill v. Peekskill Savings Bank*, 26 Hun, 164.) This action cannot be maintained by the plaintiff against either of the defendants, because before the trial the act under which it was brought, and the only law under which it could be maintained, if at all, had been absolutely repealed. (*Chegary v. Jenkins*, 5 N. Y. 379; *Lenhard v. Lynch*, 62 How. 56; *Kuller v. Palmer*, 1 Hill, 324; *People v. Livingston*, 6 Wend. 526; *Curtis v.*

Statement of case.

Leavitt, 15 N. Y. 1; *Washburn v. Franklin*, 35 Barr. 599.) This action cannot be maintained in a court of equity against the bank defendant under any statute or authority. (*Town of Venice v. Woodruff* 62 N. Y. 466; *Ayers v. Lawrence*, 50 id. 192.) A void contract if fully performed and its benefits received, cannot be questioned by the party receiving such benefits. (*Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Bissell v. M. S. & N. I. R. R. Co.*, 22 id. 258; *Whitney Arms Co. v. Barlow*, 63 id. 62.)

I. Sam Johnson for Reuben H. Farnham appellant. The plaintiff could not maintain this action against the Peekskill Savings Bank. (*Town of Mentz v. Cook*, 22 N. Y. Weekly Dig. 476; 3 Pom. Eq., § 1399; 2 Story Eq. Jur., § 700; 87 N. Y. 452; 81 id. 156, 474; 77 id. 542; 92 id. 465; 75 id. 397; 98 id. 222; id. 239.)

William Nath'l Cogswell for respondent. As the petition in this case did not show that the petitioners were a majority of the tax payers of the town, excluding those taxed for dogs and highway taxes only, the county judge acquired no jurisdiction of the proceedings. (*People v. Spencer*, 55 N. Y. 1; *People v. Hughitt*, 5 Lans. 89; *People v. Van Valkenburgh*, 63 Barb. 105; *People v. Smith*, 55 N. Y. 135.) As there was no power to create the bonds, so there was no power to ratify the same. (*Weismer v. Village of Douglass*, 64 N. Y. 91.) The bonds originally issued in aid of the railroad company being absolutely void, create no indebtedness against the town, and therefore there was no authority to issue the bonds now held by the Peekskill bank. The statute gives authority only to pay the bonded indebtedness by issuing new bonds. (Laws of 1878, chaps. 75, 317; Laws of 1880, chap. 146.) The town was not a necessary party. (*Ayers v. Lawrence*, 59 N. Y. 192; *Metzger v. A. & A. R. R. Co.*, 79 id. 171.) The action was well brought and has not been affected by any of the various repealing acts passed since it was commenced. (*Butler v. Palmer*, 1 Hill, 324, 330; *Ayers v. Lawrence*, 59 N. Y. 192; *Metzger v. A. & A. R. R. Co.*, 79 id. 179; *Osterhoudt v. Rigney*, 98 id. 222.) It was the intent of the legis-

Opinion of the Court, per FINCH, J.

lature to pass an act authorizing towns to issue valid bonds for void bonds, and thus to create a bonded indebtedness when there had been theretofore none; such an act would be utterly unconstitutional and void. (*Weismer v. Village of Douglass*, 64 N. Y. 91; Const., § 11, art. 8.) The Peekskill Savings Bank was not only a proper party to the suit, but was a necessary party. It was the claimant to a part of these funds that Farnham had threatened to have raised by tax. It was necessary that it should be brought into court so that it could assert its rights and the validity of the tax. (*Osterhoudt v. Board of Supervisors of Ulster*, 98 N. Y. 239; *Metzger v. A. & A. R. R. Co.*, 79 id. 171.)

FINCH, J. The whole argument of the courts below, ending in a cancellation of the bonds in controversy, rests upon the assumption that the original bonds of the town of Attica, which served as the cause and consideration of the refunding issue, were absolutely void as matter of law, although their invalidity had never been adjudged. The argument takes no note of the fact that there might be reasonable question about that, pending an adjudication, and that enough of doubt attended the ultimate result to justify the legislature in authorizing, and the town in effecting, an amicable settlement and compromise, of which the new bonds were the fruit. There was debate and litigation over the validity of the original issue. Those bonds followed a proceeding initiated by a petition to the Supreme Court, drawn in supposed accordance with the provisions of the act of 1869 (Chap. 907), as amended by the act of 1871 (Chap. 925). That petition averred that its signers were a majority of the tax payers of the town, but did not add the explanatory clause, "not including those taxed for dogs or highway tax only." The existence of this defect, it is said, we are bound by a precedent of our own making to declare, stripped the proceeding in the Supreme Court of jurisdiction, and left it absolutely void. (*People, ex rel. Green, v. Smith*, 55 N. Y. 135.) That was a case in which the county judge to whom the petition had been presented, refused the application, and the appeal reached this court in the proceeding itself; and there

appears not to have been presented to the mind of the court a provision of the act of 1869, now brought to our attention, which bears strongly upon the inquiry involved. It is not necessary to say whether to that new consideration there is or is not a satisfactory answer. It is quite enough that the validity of the original bonds of the town of Attica has never been passed upon by this court, and its ultimate action was an event unsolved, when the legislature and the town chose to avoid such solution, and act without dependence upon it. It is true that the bonds of another town in the county of Wyoming came before this court (*Metzger v. Attica & Arcade R. R. Co.*, 79 N. Y. 171), but our determination went upon a concession not here existing, and settled only that, upon the admissions made of the invalidity of the bonds, the action was properly brought and the relief justly granted. We are referred to a suit commenced in the United States Circuit Court upon coupons of the original Attica bonds, in which the holders recovered, and the court adjudged on a motion for a new trial, largely influenced by the new consideration now pressed upon us, that the tax payers' petition was sufficient to confer jurisdiction and the bonds were valid. While that decision does not bind us, the circumstance shows that, at least, there was room for a difference of judicial opinion upon the question of the sufficiency of the petition, and that in good faith the ultimate result might be deemed uncertain, and the controversy be settled by an amicable adjustment. In 1879, an action was begun in the Federal court against the town by a holder of the original bonds which has been tried, but in which judgment has not been rendered. That action was pending while the act of 1878, which authorized municipal corporations to refund their bonded indebtedness, was in force, but since it did not cover items of accrued and unpaid interest, a special act was passed in 1880 authorizing the towns of Attica and Java "to issue new bonds pursuant to the provisions of chapter 74 of the Laws of 1878" and its amendments "to the amount and extent of the bonded indebtedness as provided in said act, including interest accrued and unpaid." The town of Attica had no "bonded indebtedness," except the original bonds whose validity is now ques-

Opinion of the Court, per FINCH, J.

tioned. The defendants offered to prove that while the action last above referred to was pending it was compromised by an agreement to substitute the new bonds drawing a lower rate of interest for the bonds then in suit. This offer was refused by the court and an exception taken. The situation on both sides is thus apparent. The town of Attica, acting in supposed accordance with a statutory authority, had issued its bonds which had passed into the hands of innocent holders. Controversy arose as to their validity. The holders insisted upon that validity and brought suits to enforce them in the United States courts, and both parties thus stood upon their precise legal rights. Before an adjudication and while its result was unknown and uncertain, the legislature by a general act authorized municipal corporations to refund their "bonded indebtedness" at lower rates of interest, and the first question presented is the meaning of that phrase.

The respondents construe it to mean a legal and valid bonded indebtedness in which there are no flaws, and which could be enforced by the courts, and insist that where there was a defect of jurisdiction which made the bonds void, that there was no "bonded indebtedness" existing. That the legislature had no such meaning is apparent from the explanatory amendment passed a few weeks later than the original act. (Laws of 1878, chap. 317.) That was intended to make clear and certain the construction intended. It declared "this act shall *not* be so *construed* as to authorize the issue of new bonds to supersede or pay existing bonds which *have been adjudged invalid* by the final determination of a competent court." The enactment was superfluous and an absurdity upon the theory of the respondent. If the original act meant by "bonded indebtedness" only that which was impregnable against assault in the courts, the explanatory act was not only useless, but worse than that, for, under pretense of explanation, it made what was clear before, at once ambiguous and uncertain; since the exclusion of bonds *adjudged* to be void, inevitably draws with it the inference that all other bonds issued in behalf of a town were included in the act, whether, in fact, legal and valid or not. Not only that, but the construction here asserted involves the leg-

islature in a measure either utterly absurd and ineffective, or becoming operative and having force only through a planned and meditated deception. If the enactment had said in plain words that municipal bonds in all respects valid and legal, and those only, may be refunded at lower rates of interest, none would have been refunded. The holders of town bonds drawing seven per cent interest would have no motive to exchange them for bonds drawing a lower rate, if the latter involved every opportunity for defense which existed against the former. Investors would shun them for precisely the same reason, and, if willing to face all possible legal questions, would prefer to buy the old bonds with the higher rate of interest. The legislature did not say that. It used a plain and unambiguous form of expression, naturally meaning that all existing municipal bonds might be refunded, save only those which had been adjudged invalid. In using that language, it invited an exchange by holders of old bonds and investments by those having capital to employ, on a basis of safety which made the new issue independent of defects in the old; and if it did not mean that, it simply so phrased the law as to make it hold out a deceptive and fraudulent lure; effective only upon condition that its real meaning should be deftly concealed. And what also shall we say of the further enactment relating specifically to the town of Attica? That town had no bonded indebtedness at all if the respondent's contention be sound, and the legislature passed not only an idle and superfluous act, but one whose direct tendency would be to mislead and deceive. We have not the least doubt of the meaning and intent of the statute. Three kinds or descriptions of "bonded indebtedness," properly so called, existed when the laws of 1878 were passed. There were, perhaps, municipal bonds as to which no question had ever been raised, and probably secure against legal assault; bonds which had been questioned, and occasionally even resisted, and which might or might not prove valid, according as one court or another should conclude; and bonds which by some competent court had been adjudged invalid. The first two classes were covered and intended to be covered by the terms of the Funding Act, and the last only was excluded. This construction

fully protects every right of the municipal corporations affected by the act. It takes from them no privilege of resistance to unauthorized proceedings; it leaves them to determine whether they will stand upon the law and take its award at the end; or whether, doubtful of the legal result, and unwilling to face its peril, or impressed with the justice and wisdom of preserving untainted the municipal credit, they will avail themselves of the statutory provision, and by a convenient compromise, lessen the interest burden, and perhaps extend the period of credit. They cannot do both. The statute never contemplated both a compromise and a fight. No town could accept the provision without a consequent admission involved in the acceptance, that the old bonds were valid, for the new are permitted to be issued only to pay the old; and the fact of their issue by the town, admits that liability when it provides for it. It was to this class of cases especially that the statute could have its intended and effective operation. Undisputed bonds, drawing high rates of interest, and having long time to run, would be held firmly, since no possible motive could exist for their surrender. As to these, the statute would be ineffective until their maturity. But bonds questioned, and over whose ultimate validity there hung a doubt, would be readily surrendered in a way of compromise under the statutory permission. To hold with the respondent would violate the language of the enactment, and its natural and obvious intent, and pervert it from a purpose of peace and justice to one of litigation and artifice.

The further objection that the act of 1878 is unconstitutional upon the construction thus adopted, because it authorizes municipalities to "incur" an indebtedness for something other than "county, city, town or village purposes" (Art. 8, § 11), is answered by adding that the act did not authorize the incurring of an indebtedness, but the payment of an acknowledged debt. The Constitution does not deprive municipalities of the right to compromise a claim which they dispute, but which in the end they deem it wise and prudent to acknowledge in part and pay as acknowledged; and which might, by judicial decis-

Statement of case.

ion, but for the compromise, become a charge upon them to its full extent.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

JOSEPH MARTIN et al., Appellant, v. THE TRADESMEN'S INSURANCE COMPANY, Respondent.

Where an insurance company in issuing a policy deals with a party who remains in possession of it after execution, and is alone entitled to receive the amount thereof in case of loss, it is authorized to assume that such party has power to consent to such changes in it before breach, as will inure to the benefit of the insured. This is especially the case when the proposed alteration can neither injuriously affect the right of enforcing the contract or change the application of the moneys collectible thereon. An alteration of a contract made by one of the parties, or a third person without the consent of the other party, and while the contract is out of his hands, has no effect as to him, and the contract remains as it was originally, provided that the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed.

At the request of an insurance broker, apparently acting on behalf of mortgagees, defendant issued and delivered to the broker a policy of marine insurance upon the mortgaged property, which stated that it was issued on account of plaintiffs, loss, if any, to be paid to the mortgagees, and thereafter at the request of some one presumably representing the mortgagees, and upon the statement that G. owned the property, plaintiffs' names were erased by drawing a line through them, leaving them, however, perfectly legible, and the name of G. was interlined above them, and after the names of the mortgagees was inserted "to the extent of their interest, and balance, if any, to John Butler." The interest of the mortgagees was the full amount insured. G. in fact had the legal title to the property, he holding it in trust however for plaintiffs and Butler. *Held*, that an action for a destruction or conversion of the policy was not maintainable, as the alteration was not tortious, and plaintiffs suffered no damage therefrom.

(Argued February 4, 1886 ; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, in favor of defendant, entered upon an order made December 19, 1883, which overruled plaintiffs' exceptions and directed judgment on an order dismissing the complaint on trial. (Reported below, 17 J. & S. 416.)

This action was brought to recover damages for the alleged conversion or destruction of a policy of insurance.

The material facts are stated in the opinion.

W. H. McDougall for appellants. The policy was absolutely canceled or destroyed by the defendant, and the act constituted a conversion of the policy for which the defendant is liable in this action. (Pars. on Ins. 138; *Fanshaw v. Chabert*, 6 Moore, 386; *Campbell v. Christie*, 2 Stark. 57; *Chesley v. Frost*, 1 N. H. 145; *Outhouse v. Outhouse*, 13 Hun, 130; *Murray v. Burling*, 10 Johns. 172; Marsh. on Ins. 245-6.) The destruction or cancellation of the policy, if only partial, gave the plaintiffs a right of action for conversion or damages. (Waterman on Trespass, 12.) The policy of insurance issued by the defendant and paid for by the plaintiffs became the absolute property of the plaintiffs the moment it was signed by the proper officers. (Marsh. on Ins. 210; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. 312.) The policy of insurance was completely canceled as to the plaintiffs. (*Masters v. Miller*, 4 T. R. 32.) The measure of damages in this case was *per se* the amount insured, the plaintiffs having shown that they had an insurable interest. (*McLeod v. McGhie*, 2 Scott's N. R. 604; *Outhouse v. Outhouse*, 13 Hun, 130; *Thayer v. Manly*, 73 N. Y. 305.)

Joseph A. Shoudy for respondent.

RUGER, Ch. J. The evidence at the close of plaintiffs' case tended to show the following facts: At the solicitation of an insurance broker, apparently acting in behalf of mortgagees, on May 22, 1880, the defendant issued and delivered an insurance policy to such broker reading, so far as the part material to

Opinion of the Court, per RUGER, Ch. J.

this discussion is concerned, as follows: "Tradesmen's Insurance Company of New York on account of Martin and Kaskell, in case of loss to be paid in funds current in the city of New York to the Harlan & Hollingsworth Co., of Wilmington, Del., do make insurance and cause \$5,000, to be insured upon the body, tackle, apparel and other furniture of the steam-boat *Adelaide*," etc. On June eighteenth, thereafter, some one also presumably representing the mortgagees, presented the policy to the defendant, and requested it to erase the names of Martin and Kaskell, and insert that of John Garvey in place thereof, upon the ground that Garvey was the owner of the steamer when insured, and such alteration seemed necessary to validate the policy. The defendant thereupon drew a line with a pen through the words "Martin and Kaskell," and interlined above them the words "John Garvey," and at the same time also inserted the words "to the extent of their interest, and balance, if any, to John Butler," after the words "Wilmington, Del.," leaving, however, the original language of the policy as legible as before the alteration. It was then re-delivered to the person producing it, and returned to the Harlan & Hollingsworth Company, who, from its original execution to the time of the trial, presumptively retained its possession. It further appears that the boat was purchased in May, 1879, of the Harlan & Hollingsworth Company by Martin, Kaskell and one Butler, but for certain reasons it being desirable to conceal Butler's interest in the transaction, the bill of sale was taken in the name of Martin and Kaskell alone, one-half to each. Subsequently and in November, 1879, Butler becoming desirous of having his interest in the boat protected by some written evidence, requested Martin and Kaskell to convey it to John Garvey in trust for the then owners; and thereupon a bill of sale of the boat was executed by Martin and Kaskell to Garvey and was delivered to some one for him, and he, so far as appears, retained it until the time of the trial. After the purchase of the boat in 1879, the plaintiffs took possession and employed it in running between Long Branch and New York, in the transportation of passengers until June 19, 1880, when it was sunk

Opinion of the Court, per RUGER, Ch. J.

and lost, in the Hudson river through a collision with another boat. It also appeared that the plaintiffs advanced from the earnings of the boat to the Harlan & Hollingsworth Co., part of the premiums required to procure \$20,000 insurance, and the same was effected in equal amounts of \$5,000 each, in the defendant's and three other companies, and that the Harlan & Hollingsworth Co. was, at that time, and until after the loss of the boat continued to be, the holders of mortgages thereon, executed by Martin and Kaskell to the amount of the entire insurance. It also appeared that the Harlan & Hollingsworth Co received from the respective insurance companies after the loss, upon the several insurance policies referred to seventy five per cent of the gross amount thereby insured, and applied the same upon their mortgages, leaving due thereon the sum of \$5,000, that being precisely the amount remaining unpaid upon such policies.

On this state of facts the plaintiffs claimed to recover upon the ground that the act of the defendant in erasing the name of "Martin and Kaskell," from the policy, and inserting in place thereof that of "John Garvey," constituted a conversion of the policy as against them, rendering the defendant liable to the plaintiffs for the amount thereof, or such other amount as might represent their interest therein.

Upon the trial the complaint was dismissed upon the ground that there was no proof of any damages, sustained by the plaintiffs from the alteration of the policy. The judgment of the trial court was affirmed on appeal, and from such affirmance this appeal was taken.

We are of opinion that these judgments should for several reasons be affirmed. The form of the policy as originally drawn was somewhat peculiar, and was not probably such as would have been adopted by the parties, had they been well advised. Although the interest of Martin and Kaskell alone is insured, they were not then legal owners, and were never in equity, sole owners of the boat, and the policy does not provide for any recovery by them of the amount of the insurance. The plaintiffs probably had an insurable interest in the boat,

Opinion of the Court, per RUGER, Ch. J.

but serious questions exist as to the value and extent of such interest, and the rights of Butler their co-tenant in the proceeds of the policy.

Inasmuch as all of the interests, both legal and equitable, had been united in John Garvey, as a trustee for all parties before the execution of the policy, it would obviously have been the safer plan to have named his, as the insurable interest in the original instrument. As the policy was drawn, it was undoubtedly the interest of Martin and Kaskell alone that was insured, yet in case of loss the amount thereof was required to be paid unconditionally to the Harlan & Hollingsworth Company, and it was apparently the sole beneficiary of the contract. Its right of recovery thereon in case of loss would undoubtedly be defeated, by the want of an insurable interest in Martin and Kaskell, or any violation by them of the conditions of the policy, but the Harlan & Hollingsworth Company having paid a portion of the premium required, and having authority to effect insurance for their own benefit, and receiving and holding the policy issued for that purpose, with an interest therein covering the entire amount of the insurance, had for the purpose of protecting such interest, apparent authority to procure such an alteration of the policy as would promote the object intended in effecting it. So far as the defendants knew they were the parties solely interested in the transaction, and until after notice of the rights or claims of other persons, could safely deal with the parties procuring the insurance, in reference to any change or modification of its terms. If the mortgagees were in fact the agents of the plaintiffs in procuring such insurance and violated their instructions either in procuring it, or changing its terms afterwards to the prejudice of their principal, it would render them liable for any damages resulting therefrom. When, however, the insurer in issuing a policy deals with a party who remains in possession of the instrument after execution, and is alone entitled to recover the amount thereof, in case of loss, he is authorized to assume that such party has power to consent to such changes in it before breach as will inure to the benefit of the insured, and tend to perfect the validity of the contract.

This would seem to be especially the case, when the proposed

alteration could neither injuriously affect the right of enforcing it, or change the application of the moneys collectible thereon. Under both forms of the contract, the moneys in this case were recoverable only by the Harlan & Hollingsworth Company, and would be, when received, applicable only to the satisfaction or reduction of the plaintiffs' indebtedness to them.

Thus in any event the plaintiffs would, under either form of the policy, receive what they contracted for, and as it turned out, have no cause of complaint, whatever might have been the case under a different state of circumstances.

The legal title of the boat was unquestionably in John Garvey, and he held it as trustee for Martin, Kaskell and Butler. The change made in the policy simply affected the form of the contract, and not the equitable rights of the parties, and seems to have been made in good faith simply for the purpose of validating it. (*Myer v. Hencke*, 55 N. Y. 412.)

There was obviously no intent on the part of either of the parties to the transaction, to effect a destruction or cancellation of the instrument by its alteration, but it was made with intent solely to remedy a real or supposed defect, which threatened its validity. No interest which the plaintiffs might have in the contract was impaired by the erasure complained of, for if it was made by their authority, they had no right to complain, and if not, and such authority was necessary to be obtained, the alteration did not vitiate their contract, or impair their right to enforce it. The rule is well established that an alteration of a contract under which a plaintiff claims, made by a defendant or some third party, without the plaintiff's consent, and while the contract is out of plaintiff's hands, has no effect, and the contract will remain as it originally stood, provided the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed. (Addison's Law of Cont. 286, and authorities cited; *Nichols v. Johnson*, 10 Conn. 192; Phillips on Ins., §§ 114, 115; *Van Brunt v. Eoff*, 35 Barb. 501.)

We are, therefore, of the opinion that the alteration in question was not a tortious act on the part of the defendants, and did not constitute a conversion of the policy. We are also of

Opinion of the Court, per RUGER, Ch. J.

but serious questions exist as to the value and extent of such interest, and the rights of Butler their co-tenant in the proceeds of the policy.

Inasmuch as all of the interests, both legal and equitable, had been united in John Garvey, as a trustee for all parties before the execution of the policy, it would obviously have been the safer plan to have named him, as the insurable interest in the original instrument. As the policy was drawn, it was undoubtedly the interest of Martin and Kaskell alone that was insured, yet in case of loss the amount thereof was required to be paid unconditionally to the Harlan & Hollingsworth Company, which it was apparently the sole beneficiary of the contract. If the right of recovery thereon in case of loss would undoubtedly have been defeated, by the want of an insurable interest in Martin and Kaskell, or any violation by them of the conditions of the policy, but the Harlan & Hollingsworth Company having paid the premium required, and having authorized the Harlan & Hollingsworth Company to insure for their own benefit, and receiving and retaining the policy issued for that purpose, with an interest therein, the entire amount of the insurance, had for the purpose of protecting such interest, apparent authority to procure the alteration of the policy as would promote the success of the company in effecting it. So far as the defendants knew, the plaintiffs were the parties solely interested in the transaction, and the defendants, of the rights or claims of other persons, could not interfere. The parties procuring the insurance, in reference to the alteration or modification of its terms. If the mortgage agents of the plaintiffs in procuring such insurance, acted in accordance with their instructions either in procuring it, or in making afterwards to the prejudice of their principals, the plaintiffs are then liable for any damages resulting therefrom. However, the insurer in issuing a policy dealing with the insured, remains in possession of the instrument, and is alone entitled to recover the amount thereof. It is authorized to assume that such part of the policy as contains such changes in it before breach as were made by the insured, and tend to perfect the contract.

This would seem to be especially true

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Div. Pro., § 484.)

Statement of case.

the opinion that the plaintiffs have suffered no damage from the act complained of.

At the time of the destruction of the *Adelaide* they had no interest in the contract, except to have the moneys recoverable thereon collected and applied in reduction of their indebtedness to the mortgagees, and for the purpose of effecting this object, the mortgagees were their agents, and responsible to them for the manner in which that right was enforced. (*Cons v. Niagara Ins. Co.*, 60 N. Y. 619.)

The whole insurance moneys were no more than sufficient to pay the mortgage and would in no event afford a surplus recoverable by the owners of the property. But however this may be, we have seen that the plaintiffs' remedies upon the policy were not impaired by the alteration made in it, and, therefore, they cannot have suffered damages by reason thereof.

The judgments of the courts below should be affirmed.

All concur.

Judgment affirmed.

ROYER WHEEL COMPANY, Respondent, v. ROBERT W. FIELDING et al., Appellants.

The General Assignment Act of 1877 (Chap. 486, Laws of 1877) does not include or apply to a specific assignment by a debtor for the benefit of one or a portion of his creditors, and such an assignment is not void because not executed in compliance with the provisions of said act.

The provision of the Revised Statutes (1 R. S. 678, § 55), providing for express trusts to sell lands for the benefit of creditors, does not prohibit the grantee of an insolvent debtor from executing a mortgage to secure the payment of specific debts of the grantor in pursuance of a prior oral understanding entered into at the time of the execution of the conveyance.

A mortgage so executed is not rendered void by a provision therein requiring any surplus arising on foreclosure sale to be paid over to the mortgagor.

A member of a firm may appropriate his individual property to the payment of the firm debts, and where the firm has made a general assignment for the benefit of its creditors a conveyance by one of its members of his individual property to the assignee, to be disposed of and applied in accordance with the terms of the assignment to the payment of the partnership debts, is not *per se* fraudulent or unlawful and void.

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Statement of case.

It is not essential that such a conveyance should be executed in accordance with the requirement of the General Assignment Act.

Royer Wheel Co. v. Fielding (31 Hun, 274), reversed.

(Argued February 4, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 9, 1883, which affirmed, so far as appealed from, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 31 Hun, 274.)

The nature of the action and the material facts are stated in the opinion.

Joseph A. Shoudy for appellants. The complaint should have been dismissed upon the defendant's motion, on the ground that the plaintiff had no standing in court to maintain a creditor's suit. (*Pardee v. De Cala*, 7 Paige, 132; *McElwain v. Willis*, 9 Wend. 560, 561; *Crippen v. Hudson*, 13 N. Y. 166; *Shaw v. Dwight*, 27 id. 244; *Mech. & T. Bk. v. Dakin*, 51 id. 522; *Fox v. Moyer*, 54 id. 125; *Geery v. Geery*, 63 id. 252, 256; *Adsit v. Butler*, 87 id. 585, 587.) The property conveyed to the appellant, James E. Fielding, was the individual property of one of the copartners, and before it could be reached for the payment of copartnership debts, an execution must have been issued and returned unsatisfied as to the copartnership property. (*Beardsley S. Co. v. Foster*, 36 N. Y. 565; *Lewisohn v. Drew*, 15 Hun, 468.) Copartnership debts are primarily chargeable upon copartnership property. (*Wilson v. Robertson*, 21 N. Y. 592; *Collomb v. Caldwell*, 16 id. 484.) The conveyances by George Fielding to his son under the agreement, though voluntary, created a trust which was capable of being enforced, and which was in part performed by the subsequent execution of the mortgage in which both the grantor and grantee joined to secure the payment of the same creditors. (*Leitch v. Hollister*, 4 N. Y. 213.) There was a misjoinder of causes of action in the complaint in this action. (Code of Civ. Pro., § 484.)

Wilson M. Powell for respondent. As to the real estate it mattered not as to plaintiffs' lien whether the execution was in the sheriff's hands or not, and it mattered not where the execution was, so long as it had been issued and was unsatisfied. (*Geery v. Geery*, 63 N. Y. 252; *Payne v. Sheldon*, 63 Barb. 170; *Buswell v. Lincks*, 8 Daly, 518; *Adsit v. Butler*, 87 N. Y. 585; 3 R. S. [6th ed.] 590, § 55; Code, § 1871; *McElwain v. Willis*, 9 Wend. 549, 561; *Mech. Bk. v. Dakin*, 51 N. Y. 519, 522; *Nat. Bk. v. Mead*, 18 Hun, 303; *Shaw v. Dwight*, 27 N. Y. 244; *Fox v. Moyer*, 54 id. 125; *Pardee v. DeCala*, 7 Paige, 132.) The evidence showed an actual fraudulent intent. (*Edgell v. Hart*, 9 N. Y. 218; *Seymour v. Wilson*, 14 id. 569; *Southard v. Benner*, 72 id. 431; *Ford v. Williams*, id. 364; *Gardner v. McEwan*, 19 id. 125.) It can make no difference that some of the property was owned by George and Robert Fielding together; all the transfers being tainted with the fraud of one or the other, or both, can be set aside in one action, there being but one cause of action. (*Reed v. Stryker*, 12 Abb. 47; *Fellows v. Fellows*, 4 Cow. 682; *Morton v. Weil*, 33 Barb. 30; *Boyd v. Hoyt*, 5 Paige, 77; *Newbold v. Warrin*, 14 Abb. 80; *Coleman v. Phelps*, 57 How. Pr. 393.) The fact that the conveyances to James E. Fielding were fraudulent is shown by the insolvency of the grantor and that the consideration is nominal. (*Morgan v. Potter*, 17 Hun, 403; *Babcock v. Eckler*, 24 N. Y. 632; *Carpenter v. Roe*, 10 id. 230; *Cole v. Tyler*, 65 id. 77.) The statute allows express trusts "to sell lands for the benefit of creditors," not to mortgage them for that purpose. (2 R. S. [6th ed.] 1106.) The mortgage is void for the reason that it contains a provision to render the overplus, if any there shall be, unto the said parties of the first part. (*Goodrich v. Downs*, 6 Hill, 438; *Strong v. Skinner*, 4 Barb. 546; *Barney v. Griffin*, 4 N. Y. 365; *Leitch v. Holister*, id. 211.)

MILLER, J. This action is in the nature of a creditor's bill, and was commenced to set aside as fraudulent:

First. A general assignment for the benefit of creditors,

made by the firm of Fielding Brothers, consisting of George and Robert Fielding, to the defendant Robert W. Fielding, dated November 6, 1880.

Second. Two conveyances of two separate pieces of land, made by George Fielding in his life-time, to his son James E. Fielding, dated November 3, 1880, for the nominal consideration expressed in the deeds of one dollar.

Third. A conveyance of certain real estate, dated November 15, 1880, from Robert Fielding to Robert W. Fielding as assignee for the benefit of creditors, to be held and disposed of according to the provisions of the general assignment made to him by Fielding Brothers, the consideration named in the deed being one dollar.

The court held that the general assignment was not made with intent to defraud creditors, and was valid and should be upheld. It also held that the two conveyances from George to James E. Fielding, and the one from Robert to Robert W. Fielding as assignee, were fraudulent and void, and should be set aside.

The first question that arises is as to the validity of the two deeds from George Fielding to James E. Fielding, bearing date November 3, 1880. It appears that only a nominal consideration is named in these conveyances, and that at the time of their execution, the grantor was insolvent. It is not shown that any property was retained by the grantor for the payment of his own debts, and from the facts, it is to be presumed that such was not the case. Although the property belonged to the grantor individually, and the plaintiff's judgment was against the firm of which he was a member, such judgment was a lien upon the grantor's real estate which could be enforced. The grantor and his partner were totally insolvent, and unable to pay their debts and had no other property, individually, except the three parcels of land conveyed, two to James E. Fielding, and the other to Robert W. Fielding, as assignee. The deeds showing a want of consideration, and the evidence proving the insolvency of the grantors beyond any question, under such cir-

cumstances the presumption is *prima facie* that the deeds were fraudulent. (*Erickson v. Quinn*, 47 N. Y. 410.)

It is claimed, however, by counsel for the appellants, that the two conveyances from George to James E. Fielding were made, and the title vested in the grantee, not to avoid the payment of his debts, but that the property might be appropriated for that purpose for the benefit of certain of his creditors, named at the time, whom the grantor supposed were entitled to a preference.

The testimony of the attorney who drew the conveyances and attended to their execution shows that such was the intention, and it is insisted that these conveyances created a trust in the grantee which could legally be enforced, and was subsequently performed in part, on the sixteenth of November, by the execution of a mortgage by the grantor and grantee, covering the real estate embraced in both deeds, to Margaret H. Frost, a creditor, for the benefit of herself and the other creditors who had been specified at the time of the execution of the deeds. This mortgage provided that after payment to the creditors named therein, on a foreclosure sale of the premises being had, the overplus, if any, should be paid to the mortgagors.

As a general rule a debtor has the right to convey property to his creditors in payment of debts which he owes, and had the deeds been directly to his (George Fielding's) creditors no valid reason exists against the legality of the mortgage. Nor do we think the fact that the mortgage was executed after the deeds to secure these creditors, in pursuance of an arrangement made at the time the deeds were executed, renders the transaction unlawful and of no effect. It is urged that it was a conveyance for the benefit of creditors made in a manner which was illegal and void and in contravention of the provision of section 2, chapter 466, Laws of 1877, which declares: "Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and every such conveyance or assignment shall be recorded in the

Opinion of the Court, per MILLER, J.

county clerk's office of the county where such debtor resided or carried on his business, at the date thereof. * * * The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of or indorsed upon the assignment before the same is recorded, and if separate from the assignment shall be duly acknowledged."

If we were confined in the interpretation of the act referred to, to this second section, it might, perhaps, be said, that it was applicable to any conveyance or assignment made by a debtor for the benefit of creditors, but this construction is too restricted if the whole act be taken and considered together. The act relates to the assignment of debtors for the benefit of creditors; the first section provides that it may be cited for all purposes as the General Assignment Act of 1877, and the third section for the making of schedules in reference to the property assigned.

Considering the act as a general act enacted for the specific purpose named we think it must be held to relate to a general assignment for the benefit of creditors and not to a specific assignment for the benefit of one or a limited number of creditors. It does not relate to a specific conveyance of the character of the one here presented, which is not a general assignment but a transfer of specific pieces of property in payment of certain creditors particularly named. Such a conveyance cannot be regarded as coming within the meaning and scope of the provisions of the General Assignment Act referred to, and is not void for not conforming to its provisions. Nor was the transaction void on the ground that it was in conflict with section 55 (1 R. S. 678), which provides for express trusts to sell lands for the benefit of creditors. While this statute does not authorize the mortgaging of lands by an assignee to raise money to pay creditors, it contains nothing which prevents a debtor or the grantee of a debtor, in pursuance of a prior oral understanding, entered into at the time of the execution of the conveyance to him, from executing a mortgage to secure the payment of specific debts. No trust was created by the conveyances and the mortgage for any such purpose, and hence the statute in question was not violated thereby.

Nor was the mortgage void because of the provision in the same that upon a foreclosure sale the overplus, if any, should be rendered to the parties of the first part. This is the usual clause in every mortgage upon real estate, and as here employed cannot be regarded as of the same character as if used in an assignment of property for the benefit of creditors specially preferred, in which case it would render the assignment inoperative and void. So far as the grantor, George Fielding, is concerned it may be said that when the mortgage was executed he had no interest in the premises, having conveyed the same to James E. Fielding. It was not necessary that he should execute it, and it would have been sufficient if executed by James alone. In view of the fact that George had no interest in the premises such a provision as to him was of no consequence. So far as James is concerned, he merely acted as a trustee under the conveyance to him, and he, therefore, would have no claim to the overplus, and it would necessarily pass to the creditors of George, if any there were, individually, or of the firm of which he was a member.

We are also of the opinion that the deed from Robert Fielding to Robert W. Fielding, assignee, was valid and effectual for the purposes therein named. As we have seen, the act of 1877 relates to general assignments and not to conveyances of specific property. It does not include a transfer of individual property for the benefit of the creditors of the assignor. No reason exists why a member of a firm cannot appropriate his individual property to the payment of the debts of the firm, of which he is a member, in accordance with the provisions of the general assignment law for the benefit of creditors. The grantor here had a right to retain his individual property and it did not pass by the general assignment of the firm. No one could object to the transfer of the same to the assignee except individual creditors, and it cannot be said that such a transfer, of itself, is fraudulent and void. The assignee under the general assignment had a perfect right to receive any property which might be conveyed or assigned to him belonging to either of the partners, and in accepting such a transfer it was

Statement of case.

not essential that the provisions of the act of 1877 should be complied with. In fact such a proceeding as making the inventory required by section 3 of said act would be entirely impracticable under such a transfer, as it may be assumed that the debtor had no other property of his own to transfer. Whether he had or not was no objection to the assignee's receiving and accepting such property as he chose to convey or pass over to him without complying with the forms required under the General Assignment Act.

We do not think the objection that the execution was not outstanding available.

No actual fraud was found by the judge upon the trial and for the reasons stated, we are of the opinion that the judgment was erroneous.

The judgment should be reversed, and a new trial granted with costs to abide the event.

All concur.

Judgment reversed.

ELIAS BACH et al., Respondents, v. DAVID LEVY et al., Appellants.

Defendants contracted to sell and deliver to plaintiffs one hundred and seventy-five cases Connecticut tobacco, guaranteed "to be like samples." On receipt of bill plaintiffs paid for the purchase, by giving their promissory note for the amount. The tobacco delivered proved to be Massachusetts tobacco, which was of less value than the Connecticut; some of the cases were also inferior to the samples. Defendants were notified of the defects, and requested to return the note and take back the tobacco, but refused so to do; it was then, upon notice to defendants, sold at auction, in one lump. In an action to recover damages for breach of the contract, *held*, that plaintiffs' sale of the tobacco in a lump did not defeat their right to recover; that the measure of damages was the difference in value of the tobacco as warranted, and that actually delivered; and, to ascertain the latter, in the absence of other testimony, the amount received at the auction sale was properly resorted to. Also *held*, the fact that a note was given for the purchase-price, which it

Statement of case.

did not appear had been paid, did not defeat a recovery; that, under the circumstances, plaintiffs' liability on the note must be deemed the equivalent for cash.

(Argued February 5, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 8, 1884, which affirmed a judgment in favor of plaintiffs, entered upon a verdict. (Mem. of decision below, 18 J. & S. 519.)

This action was brought to recover damages for alleged breach of a contract for the sale of a quantity of tobacco.

The contract and the material facts are set forth in the opinion.

Lewis Sanders for appellants. A mere liability to pay is not sufficient to maintain an action. (*Southwick v. First Nat. Bk.*, 84 N. Y. 432; *O'Brien v. Jones*, 91 id. 197, 198; *Burt v. Dewey*, 40 id. 235.) The warranty having been reduced to writing it became the exclusive test of what the warranty was, and evidence outside of it was inadmissible. (*Gaylord Manuf. Co. v. Allen*, 53 N. Y. 519; *Joyce v. Adams*, 8 id. 296; *Eighmie v. Taylor*, 98 id. 294; *Dutchess Co. v. Harding*, 49 id. 321; *McCormick v. Sarson*, 45 id. 265; *Reed v. Randall*, 29 id. 358; *White v. Miller*, 71 id. 130.) Expert testimony was improperly received. (*Van Zandt v. Mut. B. Ins. Co.*, 55 N. Y. 179; *Ferguson v. Hubbell*, 97 id. 513.)

B. F. Einstein for respondents. The plaintiffs' right to recover damages for breach of warranty was not affected by their acceptance of the goods, assuming the contract to be executory. (*Briggs v. Hilton*, 99 N. Y. 517; *Hawkins v. Pemberton*, 51 id. 198; *Dounce v. Dow*, 64 id. 411; *Van Wyck v. Allen*, 69 id. 61; *White v. Miller*, 71 id. 118.) A sale at auction, fairly conducted, is a proper way to determine the value of property. (*Muller v. Eno*, 14 N. Y. 597; *Pallin v. Le Roy*, 30 id. 549.) The defendants having requested to go to the jury upon any question of fact, and having rested

Opinion of the Court, per DANFORTH, J.

upon the plaintiffs' case, their motion for a direction was, therefore, upon the whole case, and they thereby submitted all questions of fact to the court to decide. (*Thompson v. Liverpool, etc., Steam Co.*, 44 N. Y. Super. Ct. 407; *Appleby v. Astor Fire Ins. Co.*, 54 N. Y. 253; *Winchell v. Hicks*, 18 id. 558.)

DANFORTH, J. The plaintiffs compose the firm of Elias Bach & Son, and the defendants are copartners under the name of D. Levy & Son. A contract was made between them by S. Wollenberg, a broker who delivered bought and sold notes, in these words:

"NEW YORK, April 19, 1883.

"Sold to Messrs. Elias Bach & Son, for account of Messrs. D. Levy & Son (175) one hundred and seventy-five Conn. seconds L. tobacco, crop 1882, by Packer's samples. Mess. D. Levy & Son guarantee the tobacco to be like samples, and sound until after stripped sampling, July 1st, 1883.

"Price $10\frac{1}{2}$ c., marked weight. Insurance guaranteed and storage free.

"Terms, five months' note.

"S. WOLLENBERG."

Within a day or two thereafter, the defendants billed the tobacco to the plaintiffs, and the amount, \$6,993.88, was settled by their note. The tobacco was received about July first, and proved to be Massachusetts and not Connecticut tobacco. It was for that reason of less value, and some of the cases were also inferior to the samples. The defendants were notified of these defects, and requested to return the note and take back the tobacco, but refused to do so. It was then, upon notice to defendants, sold at auction in one lump, and this action was brought to recover damages for breach of the undertaking contained in the bought-and-sold notes. No evidence was given by the defendants, but at the close of the plaintiffs' case, their counsel requested the court to direct a verdict for the defendants upon the grounds: *First* that "the warranty was a separate warranty of each case, and that the plaintiffs, by selling the

whole cases in one lump, over seventy of which corresponded with the samples, have not presented any measure of damages for the cases proved to be different from the samples. *Second.* That the warranty as to each case being separate, the plaintiffs had no right to deal with the goods in one lump; but could only sue for and recover for a breach of the particular warranty of each case."

Failing in that, defendants' counsel asked the court to dismiss the complaint, upon the ground that at the time the action was brought the plaintiffs had suffered no damage, not having paid for the tobacco in question.

The applications were denied, and a verdict directed for the plaintiffs for \$2,626.06, as the difference between the value of the tobacco as warranted, and the tobacco actually delivered, which was fixed at the sum obtained on the sale.

We are of opinion that the decision of the trial judge was right.

First. The pleadings admit that the tobacco was paid for. That this payment was by note is immaterial, for the allegation and admission is that the note was given in pursuance of the agreement, and taken in payment of the debt. The evidence also is that the defendants refused to return it. Under these circumstances, the plaintiffs' liability on the note must be deemed the equivalent for cash.

Second. The promise expressed in the broker's notes and counted on in the complaint related not only to the quality of the tobacco as compared with the samples, but to the place of production. It was described as "Connecticut tobacco," that is, as explained in evidence, tobacco grown in Connecticut. There was in these words a representation of a fact material to the contract, and to the truth of which the vendor was, therefore, bound. The plaintiffs acted upon it, and suffered by reason of its not being true. Such representation, whether strictly a warranty or not, was part of the agreement, and it was broken because the tobacco actually delivered did not answer the description of it contained in the contract. (*Hawkins v. Pemberton*, 51 N. Y. 198.) This, also, meets the defendants'

Statement of case.

other objection, that part of the tobacco corresponded in quality with the samples. The purchaser was not only entitled to tobacco of like grade with that sampled, but of the kind he contracted for. The tobacco delivered was not at all within the description of the article sold, and it is enough that this objection applies to the whole quantity.

Third. It was for the plaintiffs to show the market value of the tobacco delivered by the defendants. For that purpose a sale at auction was properly resorted to, and its result was some evidence of the fact in question, not conclusive, but quite satisfactory in the absence of explanation or testimony from the defendants. (*Muller v. Eno*, 14 N. Y. 597.) Some other propositions are presented by the appellants' argument. They have been examined and found to disclose no error at the trial, nor any reason for the reversal of the judgment of the General Term.

It should, therefore, be affirmed.

All concur.

Judgment affirmed.

GEORGE JACKSON et al., Respondents, v. HORACE D. TUPPER
et al., Appellants.

A payment, to take an oral contract for the sale of goods, for the price of \$50 or more, out of the statute of frauds, must be made at the time of the contract. (2 R. S. 136, § 8.) A payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior agreement valid; there must be additional proof sufficient to show that at the time of the payment, the terms of the prior oral contract were in the minds of the parties and were re-affirmed by them. In which case a cause of action arises not on the prior oral contract, but on the new agreement.

Such a prior void contract, however, may be validated by a subsequent receipt and acceptance, pursuant thereto, by the buyer, of the goods or a portion of them.

(Argued February 5, 1886; decided March 2, 1886.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 31, 1884, which denied a motion for a new trial, and directed judgment on a verdict.

This action was brought to recover damages for an alleged breach of warranty in a contract of sale.

The facts are stated in the case as follows :

The defendants, at West Troy, N. Y., on the 28th day of February, 1880, orally sold to the plaintiffs about eight hundred tons of ice, which was being cut at Round pond, near Glens Falls, N. Y., and agreed to place the same in a house which they warranted should be a good, substantial house, which should stand a year. The plaintiffs orally agreed to pay for said ice the sum of eighty cents a ton. No memorandum was made in writing of this contract, and no money was paid at that time. Sometime after this, said ice was received and accepted by the plaintiffs in said house built by the defendants. After this, about May 1, 1880, the plaintiffs gave the defendants \$615, in full for said ice, by crediting said amount on an account Wight had against Tupper. When said credit was given nothing was said by either party about said contract or its terms. About May 10, 1880, the house fell. It was not properly constructed ; it was neither good nor substantial ; its defects were latent. They were not discovered by the plaintiffs before said house fell, and could not have been discovered by an inspection of the building before it fell. Its defects were known to the defendants. The plaintiffs suffered damages to the amount of \$4,131. The complaint was ordered amended to demand as damages the amount proved. The defendants on the trial introduced no evidence.

At the close of the plaintiffs' case the defendants' counsel moved for a nonsuit on the following grounds :

First. That the contract, which the evidence proves the plaintiffs and defendants entered into on the 28th day of February, 1880, was for the sale of chattels of the value of more than \$50, and not being in writing, the defendants are in no way liable for any breach of the terms of said contract.

Statement of case.

Second. That the only binding contract of sale which was made of this ice was on the 1st day of May, 1880; up to that time there was no sale. Plaintiffs were not bound to accept and pay for the ice, and the defendants not bound to deliver it.

Third. That at the time of the sale, May 1, 1880, nothing was said as to the condition of the ice or house; and no guarantee as to the length of time the house would stand was made by the defendants.

Fourth. That when said sale was made, defendants had been to see the ice, accepted and paid for it the sum of \$615, and nothing was said by either party.

Fifth. When a payment, made after the contract is made, is relied on to take the contract out of the statute of frauds, the terms of the contract must be talked over or restated.

The motion was denied and the court directed a verdict for the plaintiffs for \$4,131, subject to the opinion of the General Term; a verdict was rendered accordingly.

N. P. Hinman for appellants. The contract of February 28, 1880, was a contract of sale and not one of services. (*Smith v. N. Y. C. R. R. Co.*, 4 Keyes, 180; *Devens v. Rose*, 23 Wend. 270; *Allen v. Aquine*, 5 N. Y. Leg. Obs. 380; *Spragus v. Blackie*, 20 Wend. 61; *Brabin v. Hyde*, 32 N. Y. 519; *CHURCH*, Ch. J., 45 id. 148, 149; *Hunter v. Wetsell*, 57 id. 375; *S. C.*, 549, 533; *Hallenbeck v. Cochran*, 20 Hun, 416.) As a legal proposition, the intent of the parties who attempt to make a contract is immaterial, and cannot be given in evidence or inferred unless communicated. (*Madden v. Benedict*, 20 N. Y. Weekly Dig. 30.) An acceptance to take a contract out of the statute of frauds must be in pursuance of the contract of sale, and with intent to take possession under it as owner. (*Brabin v. Hyde*, 32 N. Y. 519; *Cunningham v. Arkbrook*, 22 Mo. 354, 361; *Rickey v. Tenbroeck*, 63 id. 563; *Davis v. Eastman*, 1 Allen, 422, *Atherton v. Newhall*, 12 Mass. 141; *Van Woert v. A. & S. R. R.*, 67 N. Y. 538; *McKnight v. Dunlop*, 5 id. 537; *Stone v. Browning*, 68 id. 598; *Marsh v. Rowe*, 44 id. 643; *Shindler v. Houston*, 1 id. 261; *Caulkins v. Hellman*,

Opinion of the Court, per ANDREWS, J.

47 id. 449; *Townsend v. Hargraves*, 118 Mass. 333; *Alger v. Johnson*, 4 Hun, 412; *Hunter v. Wetsell*, 57 N. Y. 375; *Morrell v. Cooper*, 65 Barb. 516; *Harris v. Knickerbocker*, 5 Wend. 638; *Jervis v. Smith*, Hoff. Ch. 470; *Haight v. Childs*, 34 Barb. 186.) It is not necessary to plead the statute; the defendants can avail themselves of such a defense in any case where the facts proved by the plaintiffs warrant it. (*Livingston v. Smith*, 14 How. Pr. 490; *Alger v. Johnson*, 4 Hun, 412; *Blank v. Little*, 10 N. Y. Weekly Dig. 254; 4 E. D. Smith, 390.)

G. B. Wellington for respondents. The contract was taken out of the operation of the statute of frauds by the acceptance and receipt of the ice. (1 Stat. Law of N. Y. [Diossy's ed.] 607; *McKnight v. Dunlop*, 5 N. Y. 542; *Cross v. O'Donnell*, 44 id. 664; *Fitzimmons v. Woodruff*, 74 id. 621.) The delivery and the acceptance of the ice in the building, taking the contract out of the operation of the statute, rendered the whole of the original contract valid and binding, including the warranty, "this must then be treated as an executed sale with warranty." (*McKenzie v. Farrell*, 4 Bosw. 202; *Oneida Bk. v. Ontario Bk.*, 21 N. Y. 503; *Foot v. Bently*, 44 id. 171; *Day v. Pool*, 52 id. 416; *Conor v. Dempsey*, 49 id. 665.) Where a contract is admitted by an answer, its invalidity by reason of the statute of frauds must be pleaded. In this case it could not consistently be even pleaded, for delivery and acceptance are admitted. (*Marston v. Swett*, 66 N. Y. 206; *Duffy v. O'Donovan*, 46 id. 226; *Chapin v. Dobson*, 78 id. 82.) If it be found that a collateral agreement adds something to a contract of sale, and is, in fact, a collateral agreement, it may then be an express warranty, and thus survive delivery and acceptance. (*Gaylord Mfg. Co. v. Allen*, 53 N. Y. 519; *Reed v. Randall*, 29 id. 362.)

ANDREWS, J. It is conceded that the oral contract of February 23, 1880, for the sale and storage of the ice was when made, void under the statute of frauds. It must also be conceded under the decisions in this State, that it was not validated

by the payment made in May, 1880. By our statute, payment operates to take an oral contract for the sale of goods for the price of \$50 or more out of the statute, only when it is made at the time of the contract. (2 R. S. 136, § 3.) The decisions have construed this provision of the statute with great strictness. (*Hunter v. Wetsell*, 57 N. Y. 375; *S. C.*, 84 id. 549; *Allis v. Read*, 45 id. 142.) It is in substance held that payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior oral agreement valid. There must be enough in addition to the act of payment to show, that the terms of the prior oral contract were then in the minds of the parties, and were reaffirmed by them, and this being shown, a cause of action arises, not on the prior oral contract but on the new contract made at the time of the payment. The plaintiffs did not bring their case within this principle. There was no restatement of the terms of the prior oral agreement when the payment of May 1, 1880, was made, and no express recognition thereof, nor was the payment made for the avowed purpose of binding the prior bargain. It is expressly found that nothing was said at the time by either party about the contract of February 28, 1880, or its terms. But a prior void contract may be validated by a subsequent receipt and acceptance by the buyer, pursuant thereto, of the goods, or part of them, which are the subject of the contract. (2 R. S. 136, § 3; *McKnight v. Dunlop*, 5 N. Y. 537.) Where this has been done the cause of action arises on the original oral agreement authenticated by the act of acceptance. There is no statute difficulty, as in the case of a subsequent payment, because the statute does not, as in that case, require that the acceptance must be at the time of the making of the oral agreement. It was found in this case that after the oral agreement of February 28, 1880, was made, "the said ice was received and accepted by the plaintiffs." It is impossible to construe the finding, except as referring to the ice which was the subject of the oral agreement of that date, and as referring to an acceptance thereunder. This relieved the contract from the ban of the statute. No question is presented as to the right of the

Statement of case.

plaintiffs to the judgment recovered, assuming that the contract of February 28, 1880, was validated.

The judgment should be affirmed.

All concur.

Judgment affirmed.

JOHN SWEENEY, Respondent, v. BERLIN AND JONES ENVELOPE
COMPANY, Appellant.

A servant accepts the service, subject to the risks incident to it; and where, when he enters into the employment, the machinery and implements used in the master's business are of a certain kind or condition, and the servant knows it, he voluntarily takes the risk resulting from their use, and can make no claim upon the master to furnish other or different safeguards.

A master may carry on his business with an old machine not provided with all the safeguards attached to newer machines; he may discharge a servant employed to run it, who refuses to perform his stipulated service, and a threat to do so is not coercion, which will make the master liable for injuries to the servant resulting from the use of the machine.

(Argued February 5, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made May 23, 1884, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence. Plaintiff was a printer and embosser in defendant's employ, and the negligence complained of was the omission to furnish suitable and safe machinery for the work.

The material facts are stated in the opinion.

John L. Logan for appellant. The defendant was not required to provide additional apparatus for greater safety. (*Gibson v. E. R. Co.*, 63 N. Y. 452; *DeForest v. Jewell*,

101	520
132	234
101	520
134	193
101	520
142	34

101	520
167	64
101	520
170	1471

101	520
173	1473

Statement of case.

88 id. 264.) Plaintiff having worked upon this machine for six years without injury, and if the treadle had worn smooth the plaintiff must have known it, and having failed to call the attention of any officers of the company to the fact he cannot recover. (*Warner v. E. R. R. Co.*, 39 N. Y. 468; *Painton v. The N. C. R. R.*, 83 id. 7; *Parodi v. R. R. Co.*, 15 Rep. 353; *Hough v. R. R. Co.*, 100 U. S. 213, 225.) The complaint should have been dismissed upon the ground that the plaintiff was guilty of negligence, and that his injuries were sustained purely by his own negligence. (*Hart v. H. R. Bridge Co.*, 80 N. Y. 622; *Painton v. The N. C. R. R. Co.*, 83 id. 7.) It was wholly immaterial whether any "clutch brake" had been placed on the machine or not. (*Gibson v. Erie R. Co.*, 63 N. Y. 452; *DeForest v. Jewett*, 88 id. 264.)

Albertus Perry for respondent. The defendant was bound to exercise due care in furnishing a suitable and safe machine for the use of the plaintiff and keeping it in repair. (*Cone v D.*, *L. & W. R. R. Co.*, 81 N. Y. 206; *Wright v. N. Y. C. R. R. Co.*, 25 id. 562; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521; *Flike v. B. & A. R. R. Co.*, 53 id. 549; *Corcoran v. Holbrook*, 59 id. 510; *Cooley on Torts*, 559.) The plaintiff was not guilty of contributory negligence. (*Cooley on Torts*, 559; *Marsh v. Chickering*, 25 Hun, 405; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521, 534.) By the threats of discharge the plaintiff "urged on or coerced" the plaintiff to use the machine, and therefore the plaintiff cannot be regarded as having voluntarily incurred the risk. (*Gibson v. Erie R. R. Co.*, 63 N. Y. 449, 453; *Hawley v. N. C. R. R. Co.*, 82 id. 370; *Kain v. Smith*, 25 Hun, 146; 89 N. Y. 375.) There was no undisputed fact in the case upon which the court could adjudge as matter of law that the plaintiff was guilty of contributory negligence. (*Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 464; *Kain v. Smith*, 25 Hun, 146; 89 N. Y. 375; *Hawley v. N. C. R. R. Co.*, 82 id. 370; *Marsh v. Chickering*, 25 Hun, 405.)

DANFORTH, J. A motion by defendant for a nonsuit was denied, and the plaintiff had a verdict after instructions to the jury, to which, as the case states, no exception was taken by either party. We have therefore only to inquire whether the evidence justified its submission to the jury, as sufficient in any reasonable view to warrant a recovery. (*Burke v. Witherbee*, 98 N. Y. 562.) The machine by which the plaintiff was injured was moved by steam over which he had no control, but when necessary, its operations could be held in check by the pressure of his foot upon a pedal. The process of embossing required that the plate and die should register, or coincide. To effect that he necessarily placed his hands between them, but before doing so, put his foot upon the pedal and stopped the press; then "all of a sudden," he says, "the cam came around and jolted a little harder than it usually does, and my foot slipped," the machine started, he got one hand out, but the other was caught between the plates and crushed: hence the injury complained of. By a timely removal of the belt through which power was communicated to the machinery, he could have avoided all danger. Whether under the circumstances he should have done so, was for the jury to say, and their verdict must be deemed conclusive in his favor upon that point.

To sustain the judgment in other respects the plaintiff alleges negligence on the part of the defendant in not providing a "clutch" or some contrivance other than the pedal to prevent motion in the machine while the operator's hands were exposed to danger. It is important to notice that no fault was found with the condition of the pedal, or other contrivances, or the management of the engine. It may very well be that had the surface of the pedal been cut or roughened like a file or rasp, its holding power would have been greater, but there is no evidence that it was ever in that condition, nor but that its surface was smooth or slippery when the plaintiff, five or six years before, entered the employment of the defendant and began to use the machine. The complaint to the superintendent was not as to the condition or any imperfection of the pedal, but as to its sufficiency. The plaintiff testified: "I stated" to him

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"that the only means of throwing this machine out of gear or stopping it was by putting the foot on that little treadle; then that could not be done unless the cam had got around it; the cam would have to clutch it before you could do that."

So the pleading, and the plaintiff's evidence show that he was directed "to use and operate 'the Isaac Adams press,' which was an old embossing press, having no late or modern improvements for using or operating the same in safety;" that he entered upon the work in question upon belief that it was safe, "but at the same time told the defendant that he thought it required and ought to have an additional apparatus to stop the same and render it perfectly safe and secure, but he was required to proceed with the work without any such change or improvement, although he requested the same to be furnished."

It must be conceded in favor of the plaintiff that the jury would have been authorized to find these facts, and although the complaint does not allege it, there is testimony tending to show that what the plaintiff asked was that a "clutch" be attached to the machine, and that the superintendent referred him to the machinist, who promised to attend to it as soon as he had time. All this, however, was before the work was undertaken, in doing which the accident happened. Upon that occasion the plaintiff says: "I told him it was an ugly job to work on, and he told me to go ahead with it and be careful, and if I did not care about doing it, I could get out; that there were plenty of other people waiting for employment; that there were men coming in there every day looking for it; I asked him at different times to have it improved. I asked him if he would not have the press improved by having a brake put on it. He told me to go on, and if I did not, that there were plenty waiting for the job; I believe then I asked him about having the press repaired, having the improvements put on it, and he referred me to the machinist; I went to the machinist and he said that he would do all this that I explained to him about having the press improved, that he would do it when he had time."

Opinion of the Court, per DANFORTH, J.

It is evident that this is not a case where the machine by means of which the business was carried on was temporarily out of repair, as in *Clarke v. Holmes* (7 Hurl. & N. 937), or *Kain v. Smith* (89 N. Y. 375), or where the defect exposed the servant to any latent extraordinary danger, but at most one where the employer failed to discard a machine, or part of a machine, and supply its place with something different, and, in the opinion of the plaintiff, something safer. He was under no obligation to do so. The machine was safe in any view of the evidence, so long as the pedal was pressed by the operator. It was not automatic; neither was the proposed substitute. Each required the attention of an intelligent actor, and the real condition and efficacy of the one in use was not concealed from or unknown to the servant. He knew as much about it, and the risk attending its use as the master. The defendant could not be required to provide himself with other machinery or with new appliances, nor to elect between the expense of so doing, and the imposition of damages for injuries resulting to servants from the mere use of an older or different pattern. In the absence of defective construction, or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability for injuries arising from its use. The general rule is that the servant accepts the service, subject to the risks incidental to it, and where the machinery and implements of the employer's business are at that time of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards; *De Forest v. Jewett* (88 N. Y. 264), where a car-coupler stepped into a sluice in defendant's yard and was run over; *Hayden v. Smithville Manfg. Co.* (29 Conn. 548), where an employe in a mill received an injury to his hand by being caught in the gearing of a spring frame. In *Gibson v. Erie Railway Co.* (63 N. Y. 449), the last case is cited with approval, and the rule applied where an employe was killed by a projecting roof. Under such circumstances, the servant is regarded as voluntarily taking the risks resulting from the use of the machinery, unless, as is said, the master by urging

Opinion of the Court, per DANFORTH, J.

on the servant, or coercing him into danger, or in some other way, directly contributes to the injury, or assumes the risk. *Kain v. Smith* (*supra*), and *Hawley v. Northern Central Railway Co.* (82 N. Y. 370), cited by respondent, went upon that ground, and although in one the tool was defective, and in the other, the road-bed out of repair, negligence was not imputed to the servant. This exception is relied upon by the respondent. We think the evidence does not bring the defendant within it. If the defect had been in the pedal and a promise made to repair that, and yet directions given for its use, it might be otherwise, but here the promise, if there was any, concerned a new appliance, not attached to that particular machine, nor to any machines of that make. The "Adams machines," as the plaintiff's witnesses proved, were uniformly furnished with the pedal. A clutch had never been seen on one. They were for different purposes. The pedal was to stop the machine; the clutch was to put the machine in motion. But we think there was no promise made to the plaintiff, nor inducement offered him to take the risk. It cannot be said that there was any connection between the conversations above set forth, and the continuance of the plaintiff in the defendant's employment. Nor does the complaint allege any. On the contrary, it alleges a simple request "that the change or improvement be made," not a promise or suggestion that it should be. There was no direction by the master, nor reliance upon the judgment of a superior officer. It is plain that the danger, to the knowledge of the plaintiff, was inherent in the use of the machine, and to the work itself; the peril did not grow out of extrinsic causes or circumstances which could not be discovered by the use of ordinary precaution, nor to a condition of things different from those existing at the beginning of the service. It was part of the plaintiff's engagement that the master's work should be performed in the usual course and way of business. The work which the servant was called upon to do at the time in question, was not of a different character from that which he originally undertook; and the machine upon which it was to be done was one then in use. No new duty or species of labor was

Statement of case.

imposed upon him, nor was he required to work a machine with which he was not familiar. He was simply called upon to do that for which he was engaged, and the doing of which formed the consideration of his employment. To say that the master shall be liable to the servant in such a case is to say that he shall not have the benefit of the labor for which he contracted. Such is not the law. The defendant might, if he chose, carry on his business with an old, rather than a new machine, and could not be required to keep in his employ a servant who would not run it. He might, therefore, call upon the servant to perform his stipulated service, and discharge him if it was withheld. A threat to do so is not coercion. Here there was nothing more. Under such circumstances, there is no ground for charging the defendant with negligence, or throwing upon it a risk assumed by the plaintiff when he took employment. While it is difficult to see how the accident could have occurred, except from the inattention of the plaintiff, that question was for the jury, but because the evidence in no aspect discloses negligence or failure of duty on the part of the defendant, we think the case was improperly submitted to them as one in which the plaintiff might recover.

The judgment should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

SARAH E. NICHOLS, Administratrix, etc., Respondent, v.
CHARLES F. MACLEAN, Appellant.

While the legislature may abolish an office, diminish the salary or change the mode of compensation during the term of an incumbent, subject only to constitutional restrictions, yet within these limits the right to an office carries with it the right to the emoluments, and an officer unlawfully dispossessed of his office may, upon his reinstatement therein, maintain an action against an intruder, to recover the damages resulting from the intrusion; as a general rule, the salary or fees of the office received by the intruder are the measure of damages.

101	526
126	644
101	526
133	579

101	526
152	75

Statement of case.

Plaintiff was duly appointed police commissioner of the city of New York ; he duly qualified and entered upon the performance of the duties of the office. Subsequently he was unlawfully removed by the mayor, and defendant appointed for the unexpired term. The latter, on presentation of his certificate of appointment, was recognized by the board of police commissioners, and assumed the duties of the office against the protests of plaintiff, who claimed the appointment was unauthorized. The proceedings of the mayor in removing plaintiff were reversed and annulled on *certiorari*, and thereupon he was again officially recognized by the board, and resumed the duties of his office ; during the time of his exclusion he was ready and willing to perform such duties. Defendant drew the salary of the office during the time he performed its duties. *Held*, that an action to recover the amount so received was maintainable ; and that the record in the *certiorari* proceedings was properly admitted in evidence against the defendant on the trial of the action.

As to whether in such case the record, in the absence of collusion or fraud, is conclusive, *quære*.

The distinction between this case and one where the officer *de jure* has not been reinstated pointed out.

It seems in the latter case the remedy of the officer is by action in the nature of a *quo warranto* ; but such an action will not lie when the intruder has voluntarily surrendered the office.

An illegal exercise of the power of appointment to fill an assumed vacancy confers no additional protection upon the appointee because coupled with the fact of a prior summary removal of the rightful incumbent by the officer who made the appointment, in the exercise of a *quasi* judicial discretion.

The doctrine which protects rights acquired on the faith of a judgment, notwithstanding its subsequent reversal, is not applicable to such a case.

(Argued February 8, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made March 10, 1884, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial.

This action was originally brought by Sydney P. Nichols to recover damages for the alleged unlawful usurpation by defendant, and receipt of the salary of the office of police commissioner of the city of New York, to which plaintiff claimed he was entitled.

Statement of case.

Pending the appeal to this court said plaintiff died, and the present plaintiff was substituted.

The material facts are stated in the opinion.

Samuel Hand & Malcolm Graham for appellant. The defendant not being a party to the *certiorari* proceedings, nor accepting a benefit thereby, is not bound by those proceedings. (*People, ex rel. Gilchrist, v. Murray*, 73 N. Y. 538; *People, ex rel. Steinart, v. Anthony*, 6 Hun, 142; *Mayor v. Flagg*, 6 Abb. 302; *Rex v. Hebden*, Andr. 388; *Rex v. Grimes*, 5 Burr. 2599; *Rex v. Mayor of York*, 5 D. & E. 66; *People, ex rel. Corwin, v. Walter*, 68 N. Y. 403; *Dale v. Roosevelt*, 1 Paige, 35; *York v. Steele*, 50 Barb. 397.) The court cannot here inquire whether the defendant was rightfully in office. (*Mayor v. Flagg*, 6 Abb. 303; *Buffalo v. Mackay*, 15 Hun, 204; *People, ex rel. Steinart, v. Anthony*, 6 id. 142; New Code, § 3349, subd. 11, § 3352; *People, ex rel. Peabody, v. Att'y-Gen.*, 22 Barb. 114; *People, ex rel. Demarest, v. Fairchild*, 67 N. Y. 334; *S. C.* below, 8 Hun, 334; *Mott v. Connelly*, 50 Barb. 516; *Hart v. Harvey*, 5 Hill, 616; *People, ex rel. Faile, v. Ferris*, 76 N. Y. 326; *Mickles v. Rochester City Bk.*, 11 Paige, 118; *Demarest v. Wickham*, 63 N. Y. 320; *Buffalo v. Mackay*, 15 Hun, 204; *People v. A. & S. R. R. Co.*, 57 N. Y. 161; *People, ex rel. Corwin, v. Walter*, 68 id. 103; *People v. Sup. Queens Co.*, 1 Hill, 195; *Tappan v. Grey*, 9 Paige, 507; *Boyter v. Dods-worth*, 6 T. R. 681; *Howard v. Wood*, 2 Lev. 245; 2 Show. 21; *Tho. Jones*, 196; *Freem.* 473, 478; *Howard v. Queen's Trustees and Att'y-Gen.*, 2 Mod. 173; *Bradshaw v. Porter*, not reported; *Arriis v. Stukely*, 2 Mod. 260; *Sergt. Rolle's Case*, Clayt. 129; *Lamini v. Dorrell*, 2 Ld. Raym. 12, 17; *Green v. Hewett*, Peake's N. P. 243; *People v. Vail*, 20 Wend. 12; *Mott v. Connolly*, 50 Barb. 516; *Hart v. Harvey*, 5 Hill, 616; *Platt v. Stout*, 14 Abb. 139; *People v. Stout*, 11 id. 17; *Lawler v. Alton*, 8 I. R. C. L. 162.) The *certiorari* proceedings do not excuse the want of judgment in *quo warranto*. (*Crosbie v. Hurley*, 4 I. L. R. 225; *People, ex rel. Gilchrist, v. Murray*, 73 N.

Statement of case.

Y. 535.) Even judgment of ouster does not give an absolute right to the emoluments of the office. (*People, ex rel. Burton, v. Vail*, 20 Wend. 12; *Dolan v. Mayor, etc.*, 68 N. Y. 274; *Mc Veay v. Mayor, etc.*, 80 id. 185; *Terhune v. Mayor, etc.*, 88 id. 247; *Stuhr v. Curran*, 44 N. J. L. 181.) Nichols did not own the office. (*Smith v. Mayor*, 5 N. Y. 285; *Connor v. Mayor*, 37 id. 518; *Long v. Mayor*, 81 id. 425.) Defendant was more than a *de facto* officer. (*Foot v. Stiles*, 57 N. Y. 403; *People v. Van Slyke*, 3 Cow. 237; *People v. Pease*, 27 N. Y. 45.) Rights acquired on the faith of a judgment are not affected by any irregularity of such judgment. (*People v. Nichols*, 79 N. Y. 582; *People v. Cooper*, 21 Hun, 517; *People, ex rel. Gere, v. Whitlock*, 92 N. Y. 191; *People, ex rel. Keech, v. Thompson*, 94 id. 451, 464; *Hunt v. Hunt*, 72 id. 217; *Freem. on Judgm.*, §§ 104b, 135; *Lange v. Benedict*, 73 N. Y. 12; *Marshalsea Case*, 10 Co. 68, 78b; *Tidd's Pr.* 1032; *Oliett v. Bessey*, Tho. Jones, 214; *Groenvelt v. Beirwell*, 1 Ld. Raym. 454; *Saffrey v. Jones*, 1 Barn. & Ad. 598; *March v. Wooley*, 5 M. & G. 675; *Grey v. Cooksen*, 16 East, 13; *Andrews v. Mains*, 1 Q. B. 3; *Thomas v. Hudson*, 14 M. & W. 353; *Ree v. Leight*, 10 A. & E. 398; *Dawson v. Gregory*, 7 Q. B. 756; *Korn v. Mazuzan*, 6 Hill, 44; *Lamoine v. Caryl*, 4 Den. 370; *Roderigus v. E. R. Bank*, 63 N. Y. 460; *Lewis v. Dalton*, 8 How. 99; *Bumstead v. Read*, 31 Barb. 661; *Porter v. Purdy*, 29 N. Y. 106; *Barnes v. Harris*, 4 id. 374; *Van Steenburg v. Kurtz*, 10 Wend. 167; *Levison v. Burch*, 4 Hun, 315; *Von Rhade v. Von Rhade*, 2 T. & C. 491; *Cornell v. Lassells*, 29 Wend. 77; *Harmon v. Brotherson*, 1 Den. 537; *Easton v. Callender*, 11 Wend. 90; *Von Latham v. Libby*, 38 Barb. 339; *Pratt v. Bogardus*, 49 id. 90; *Savacool v. Boughion*, 5 Wend. 170.) Rights acquired on the faith of a judgment are not affected by a reversal of such judgment, but do fully and entirely survive such reversal. (*Dr. Drury's Case*, 8 Co. 141b; *Beverly v. Cornwall*, Moore, 269; *Appesly v. Ive*, Cro. Jac. 645; *Gold v. Strode*, 3 Mod. 324; *Phillips v. Biron*, 1 Strange, 509; *Turner v. Felgate*, 2 Sid. 125; *King v. Harrison*, 15 East, 615;

Statement of case.

Case v. De Goes, 3 Caines, 261; *Van Brunt v. Schenck*, 11 Johns. 375; *Dewey v. Osborn*, 4 Cow. 329; *Bank U. S. v. Bk. of Washington*, 6 Pet. 18; *Costar v. Peters*, 7 Robt. 386; *People, ex rel. Davis, v. Sturtevant*, 9 N. Y. 263; *Porter v. Purdy*, 29 id. 106; *Ebaugh v. Germ. Ref. Church*, 3 E. D. Smith, 60; *Woodcock v. Bennett*, 1 Cow. 711; *Place v. Reilly*, 98 N. Y. 1; *Blakely v. Calderer*, 15 id. 97; *Wood v. Jackson*, 8 Wend. 9; *Holden v. Sackett*, 12 Abb. 473; *Henig v. Parnett*, 4 Daly, 543; *Clark v. Davenport*, 1 Bosw. 95; *McJilton v. Love*, 13 Ill. 486; *Loring v. Illsley*, 1 Cal. 24; *Bk. of Ky. v. Van Meter*, 10 B. Monr. 66; *Frost v. McLeod*, 19 La. Ann. 69; *Rogers v. Evans*, 8 Ga. 143; *Boggers v. Howard*, 40 Tex. 153; *McDonald v. Napier*, 14 Ga. 89; *Reno v. Pinder*, 20 N. Y. 298; *Bascom v. Smith*, 31 id. 595; *People v. Police Comm'rs*, 98 id. 332.) Nichols by his acts acquiesced in MacLean's occupation of the office. (*Hadley v. Mayor*, 33 N. Y. 603; *People v. Murray*, 73 id. 535; *McVeany v. Mayor*, 80 id. 185; *Sadler v. Evans*, 4 Burr. 1984.) If the plaintiff has any remedy, it is against the parties to the removal. (*Terhune v. Mayor*, 88 N. Y. 24; *Hover v. Backhoof*, 44 id. 113; *Bennett v. Whitney*, 94 id. 302.)

John D. Townsend for respondent. The proceedings brought in the name of the people, to-wit, the *certiorari* to review the judicial action of the mayor, was a proceeding *in rem*. (2 Phill. on Ev. 262, 266; Freeman on Judgments, 504, § 606; *People, ex rel. Steinart, v. Anthony*, 6 Hun, 142; *Res v. Mayor of York*, 5 Durnf. & East, 66; *Mayor, etc., v. Flagg*, 6 Abb. 296, 302; *McVeany v. Mayor, etc.*, 80 N. Y. 189; *Pitman v. Town of Albany*, 34 N. H. 577-582.) No action of *quo warranto* was necessary in this case. The proceedings upon which the mayor pretended to have removed the plaintiff and appointed the defendant to fill his place were pronounced void by this court, and such judgment was affirmed at General Term in an action brought in the name of the people. (*Hunter v. Chandler*, 10 Am. L. R. 440; *In re Harris*, 6 A. & E. 475;

Opinion of the Court, per ANDREWS, J.

People, ex rel. Taylor, v. Thompson, 16 Wend. 654; *People, ex rel. Devlin, v. Peabody*, 6 Abb. Pr. 234; *Mayor v. Flagg*, id. 296; *Dorsey v. Smith*, 28 Cal. 21; *People v. Miller*, 24 Mich. 460; *Comstock v. City of Grand Rapids*, 4 id. 397; *People, ex rel. Morton, v. Tiernan*, 8 Abb. Pr. 359.) There is nothing in the Code which prevents the plaintiff from bringing his action against defendant for money received. (§§ 1949-1953, Code; *Crittenden v. Wilson*, 5 Cow. 165; *Stafford v. Ingersoll*, 3 Hill, 39; Sedg. on Stat. and Const. Law, 402; Comyn's Dig. 93.) In a common-law action for the recovery of fees of an office, the title to the office may be tried in a court of law. (*Howard v. Wood*, 2 Levinz, 245; *Boyter v. Dodworth*, 6 Tenn. 681; *Astor v. Woodward*, 2 Mod. 95, 96; 1 Vent. 269; 1 Freem. 429; *Green v. Hewett*, Peake's Nisi Prius Cas. 243; *Lightly v. Clinton*, 1 Taunt. 112, 114, 115; *Allen v. McKeen*, 1 Sim. 277-317; *Platt v. Stout*, 14 Abb. Pr. 179; *Mayfield v. Moore*, 53 Ill. 429; *Palmer v. Foley*, 45 How. Pr. 110; *Tappan v. Grey*, 7 Hill, 259.) The legal title to the office of police commissioner, as between the plaintiff and defendant in this action, having been determined in favor of the plaintiff by the *certiorari* proceedings brought against the mayor, the plaintiff is justified in claiming that the services of the defendant to the city were rendered for him, and that the salary the defendant drew for such services belonged to the plaintiff. (*Dolan v. Mayor, etc.*, 68 N. Y. 278, 279, 283; *Harwood v. Wood*, 2 Lev. 245; *Glosbeck v. Lyons*, 20 Ind. 1.)

ANDREWS, J. The facts, upon which this controversy depends, are few and substantially undisputed. The plaintiff was duly appointed police commissioner of the city of New York, for a term of six years from May 1, 1876, and duly qualified and entered upon and discharged the duties of the office until April 18, 1879. On that day the mayor of the city appointed the defendant, MacLean police commissioner for the unexpired term of the plaintiff Nichols, the certificate of appointment reciting that the appointment was made by the mayor in pursuance of

Opinion of the Court, per ANDREWS, J.

chapter 300 of the Laws of 1874, in place of Sidney P. Nichols, removed. Prior to the appointment of the defendant MacLean, the mayor had preferred charges against Nichols of official delinquency, upon which such proceedings were had that on the 5th day of April, 1879, the mayor made a certificate in writing removing the plaintiff from his office of police commissioner, which certificate with the reasons therefor he transmitted to the governor, who on the 17th day of April, 1879, approved in writing of such removal. The plaintiff in June, 1879, applied for a writ of *certiorari*, to review the proceedings removing him, which was issued August 12, 1879, addressed to the mayor who made return thereto, and on February 11, 1880, judgment was rendered in the proceeding declaring that the proceedings of the mayor for the removal of Nichols and his judgment of removal "be and are hereby reversed, and in all things held for naught." The judgment, as appears from the opinion delivered by the court, proceeded upon the ground that no evidence was given before the mayor to sustain the charges made against Nichols, and that he was denied the right to be heard by counsel. The defendant, MacLean, on the 18th day of April, 1879, on presenting his certificate of appointment was recognized by the board of police commissioners as commissioner in place of Nichols, and thereupon assumed the duties of the office and continued to act as police commissioner until February 7, 1880, on which day the decision of the court in the *certiorari* proceeding having been called to the attention of the board, Nichols was officially recognized as commissioner, and on that day resumed, and thereafter continued to discharge the duties of the office. During the period between the 17th of April, 1879, and the 7th of April, 1880, the defendant drew and received from the city of New York, \$4,700, the salary for that time of the office of police commissioner. It is found that the plaintiff during the time he was excluded from office was ready and willing to perform the duties thereof, and it was proved that the plaintiff on the 18th day of April, 1879, upon presentation by the defendant of his certificate of appointment protested to the defendant that his removal was unauthorized and that there was no

Opinion of the Court, per ANDREWS, J.

vacancy to be filled by the mayor. This action is brought to recover the salary received by the defendant during the time he served as police commissioner under the appointment of the mayor, and the sole question is whether, upon the facts found, the action lies.

It is convenient to consider in the outset what right the plaintiff acquired by virtue of his appointment as police commissioner in May, 1876. The term and salary of the office were fixed by statute. The plaintiff was entitled by virtue of his appointment, to a term of six years, and to an annual salary of \$6,000, subject, however, to removal from office by the mayor for cause, after an opportunity to be heard. (Laws 1873, chap. 335, § 25.) The plaintiff could not be deprived of his office or his salary, except under authority of law. His right to the possession and emoluments of the office unless forfeited by his misconduct or his office was voluntarily abandoned or taken away by law, was "as perfect a right as the title of any individual to his property, real or personal." (SANFORD, J., *Conner v. The City*, 2 Sandf. 370.) It is true that in this country offices are not hereditaments, nor are they held by grant. The right to hold an office and to receive the emoluments belonging to it does not grow out of any contract with the State, nor is an office property in the same sense that cattle or land are the property of the owner. It is, therefore, the settled doctrine that an officer acquires no vested right to have an office continued during the time for which he was elected or appointed, nor to have the compensation remain unchanged. The legislature may abolish an office during the term of an incumbent, or diminish the salary, or change the mode of compensation, subject only to constitutional restrictions. (*Conner v. Mayor, etc.*, 5 N. Y. 285.) But within these acknowledged limits, the right to an office carries with it the right to the emoluments of the office. An office has a pecuniary value, although primarily it is an agency for public purposes. The doctrine that the right to the emoluments of an office follows the true title, has been repeatedly declared in this State. (ALLEN, J., *People v. Tieman*, 30 Barb. 193; *Dolan v. The Mayor*, 68 N. Y. 274; *Mc Veany*

Opinion of the Court, per ANDREWS, J.

v. *The Mayor*, 80 id. 185.) And these decisions are enforced by the cases which hold that in an action by an officer to recover fees, his title may be put in issue, and that an action therefor cannot be maintained by an officer *de facto* only. (BRONSON, J., 1 Denio, 579, and cases cited; *People v. The Co. of Bedford*, 7 S. & R. 392.) The plaintiff, therefore, by his appointment acquired a right to hold the office of police commissioner for six years, and to receive the salary, subject to removal upon a hearing, for cause, which right, although not technically property, was valuable and is under the protection of the law. From a very early period of the law, the invasion of a right to hold and exercise the duties of a public office has been recognized as a legal wrong for which the law affords a remedy. The writ of *quo warranto* was an ancient writ to try the right of one holding a public office (2 Bl. Com. 263), and in England from an early day, an action for money had and received would lie in behalf of one entitled to an office, to recover the accustomed fees of the office received by an intruder. (*Harwood v. Wood*, 2 Lev. 245; *Greene v. Hewitt*, Peake's N. P. 243; *Boyter v. Dodsworth*, 6 Term R. 681; 1 Selw. N. P. 81.) That the action of the mayor in removing the plaintiff was wrongful, was adjudicated in the *certiorari* proceedings, and from the judgment therein, no appeal was taken. This court also decided in *People, ex rel. Mayor, v. Nichols* (79 N. Y. 582), which was a proceeding for prohibition, that a *certiorari* was a proper remedy to review the action of the mayor. The effect of the judgment in the *certiorari* was to annul the mayor's proceedings, and was followed by a reinstatement of the plaintiff in the office from which he had been unlawfully removed. Whether the judgment *ipso facto* worked a reinstatement of the plaintiff, we need not consider. The defendant voluntarily surrendered the office to the plaintiff, or at least he acquiesced in his resuming possession. The record in the *certiorari* proceedings was admitted in evidence on the trial in this case against the objection of the defendant and it is claimed that the ruling is erroneous for the reason that the defendant was not a party to the proceedings and that as to him the judg-

Opinion of the Court, per ANDREWS J.

ment therein did not establish that the removal was wrongful. The general rule that the estoppel of a judgment extends only to parties and privies is well settled. It is not always easy to determine who are privies within the rule. The *certiorari* as this court held was a proper proceeding. The mayor under the statute was vested with the power of removal to be exercised in a particular manner and under certain limitations affecting the right of the person whose removal was contemplated. These limitations were not observed, and the removal was, therefore, held to be unauthorized. The defendant held the office under an appointment by the mayor which on its face declared that he was appointed to fill a vacancy caused by the removal of Nichols. The defendant derived his title from the mayor, and the mayor, as was adjudged in the *certiorari* proceedings had at the time no power to make an appointment, because there was no vacancy. It has been held that where the title to a corporate office has been determined in a litigation between conflicting claimants in a proceeding by *quo warranto*, the adjudication is competent evidence against the corporation in an action for salary, or to compel the corporation to certify an election, and also that where the title to office of a person exercising the power of appointment has been adjudged against him, the judgment is admissible against his appointee on the ground that his title must abide by that of the person from whom he derives title. (*Mc Veaney v. The Mayor, supra*; *Rex v. Hibden*, And. 388; *Rex v. Grimes*, 5 Burr. 2598; Lord KENYON in *Rex v. The Mayor of York*, 5 Term R. 66.) These cases, although not precisely in point are analogous to the one before us. The defendant derives title under an appointment by the mayor; it has been adjudged in a proper proceeding against the mayor that he had no authority to make the appointment and that the plaintiff was improperly removed; the proceeding had some of the characteristics of a proceeding *in rem*; it was an investigation made under competent authority, in the name of the people, concerning matters of public as well as private interest, and to ascertain the status of the plaintiff. We think the

Opinion of the Court, per ANDREWS J.

record was competent evidence against the defendant. Whether it was conclusive in the absence of collusion or fraud need not be determined, as no affirmative evidence was offered by the defendant in support of his title outside of the formal papers. It is further insisted that in this State, the title to an office cannot be tried in an action against an intruder for the salary, and that it can be determined only in a proceeding by *quo warranto* or since the Code by a direct action in the nature of a *quo warranto* instituted by the attorney-general. The remedy by information in the nature of a *quo warranto*, under the Revised Statutes, authorized a judgment not only upon the right of the defendant, but also upon the right of the party averred to be entitled (2 Rev. Stat. 582, § 31), and in case the right of the claimant was established by the judgment he was authorized upon filing a suggestion to recover the damages sustained by reason of the usurpation of the defendant (§ 34). The courts held that they would not at the instance of a person out of possession of an office try the title to the office by *mandamus* or other proceeding, but would leave him to his remedy by information, and it has been said in several cases that the title could only be tried in that proceeding. (*People v. Stevens*, 5 Hill, 616; *People v. Vail*, 20 Wend. 12; *People v. Ferris*, 76 N. Y. 326; *People v. Lane*, 55 id. 217.) These cases proceed upon an intelligible principle. It would be productive of great inconvenience if a person out of possession should be permitted before ousting the person in possession and establishing his own title by a direct proceeding, to maintain an action against the intruder for the salary the result of which would neither put the intruder out of, nor the plaintiff into the office, and to have the title to an office decided in a collateral proceeding in which the people were not represented. But in this case the *de jure* officer has been restored to the possession from which he was wrongfully ejected. It has been judicially determined in a proceeding in behalf of the people that his right to the office was never legally interrupted. The defendant was not in possession when the action was commenced, and an action under the Code to eject him from the office could

not be maintained. Where the further prosecution of the proceeding by *quo warranto* is necessary to accomplish a purpose beyond the ouster of the defendant, the proceeding does not necessarily abate by the voluntary surrender of the office by the defendant after the proceeding is instituted. (*Queen v. Blizzard*, L. R., 2 Q. B. 55.) It is however the general rule that *quo warranto* will not lie where the office is vacant. (*Rex v. Whitwell*, 5 Term R. 85.) But it is insisted that, conceding the unlawful expulsion, and the intrusion by the defendant, it is not *res adjudicata* in this State that an action can be maintained by the party dispossessed, against the intruder, to recover the emoluments of the office received by him. In the case of *Dolan v. Mayor, etc.* (*supra*), it was assumed that such an action could be maintained, and authorities were cited to maintain the proposition. The determination of this question was not, perhaps, essential to sustain the judgment in that case. But we think the doctrine is well founded in reason and authority. The plaintiff being the officer *de jure*, was entitled to earn the salary. It is true that he did not render the service for which the salary is the compensation. But he was ready and willing to render it, and was prevented by the conjoint acts of the mayor and the defendant. The case of *Mc Veany v. The Mayor* (*supra*) shows that the right to the salary of an office is not necessarily dependent upon the actual rendition of service by the claimant. In that case the plaintiff was allowed to recover from the city, salary from the time judgment of ouster against the incumbent was pronounced, although the plaintiff rendered no personal service and the salary had been paid to the intruder. In the *Dolan Case* (*supra*), the claimant recovered the salary unpaid during the time Keating discharged the duties of the office. The provisions of the Revised Statutes to which reference has been made, allowing the recovery of damages by the officer *de jure* against an intruder, proceed upon the assumption that the former may recover of the latter what he has lost by the usurpation. The revisers in their note upon this subject (5 Edm. St., p. 774), say that it was intended to enlarge the scope of the remedy by information, so as "to provide

Opinion of the Court, per ANDREWS, J.

for the recovery of the fees received by the defendant." The exclusion of a *de jure* officer from his office is a legal wrong committed by the intruder. In a legal view it is immaterial that the defendant may have acted in good faith, or that he supposed he had the better title. A good motive is not an adequate answer to a claim for indemnity for a violated right. There is a great preponderance of authority in support of the doctrine that the *de jure* officer can recover against an intruder, the damages resulting from the intrusion, and that as a general rule, the salary annexed to the office and received by the defendant measures the loss. (*Dolan v. Mayor, etc., supra*; *Larlor v. Alton*, L. R., 8 Ir. 160; *Glascok v. Lyons*, 20 Ind. 1; *Douglass v. State*, 31 id. 429; *People v. Miller*, 24 Mich. 458; *Dorsey v. Smith*, 28 Cal. 21; *Segan v. Crenshaw*, 10 La. Ann. 239; *U. S. v. Addison*, 6 Wall. 291.) But as a final point the defendant invokes for his protection, the doctrine which protects rights acquired on the faith of a judgment, notwithstanding its subsequent reversal. We think this doctrine is inapplicable to the case. The appointment of the mayor and the defendant's assumption of office thereunder, made him an officer *de facto* merely. "An officer *de facto*," says Chancellor WALWORTH, "is one who comes into a legal and constitutional office, by color of a legal appointment or election to that office." (*People v. White*, 24 Wend. 518, 539.) The proceeding of the mayor in removing Nichols, was so far judicial as to authorize it to be reviewed on *certiorari*. It was not a proceeding in a court of justice under the forms and solemnities of judicial proceedings in courts, to establish the rights of litigants. The defendant did not acquire his title to the office under the so-called judgment rendered by the mayor, but under a separate and distinct proceeding subsequent thereto, by which the defendant became invested with the character of an officer *de facto*. It is abundantly settled by authority that an officer *de facto* can as a general rule assert no right of property, and that his acts are void as to himself, unless he is also an officer *de jure*. (*Greene v. Burke*, 23 Wend. 490; *People v. Nostrand*, 46 N. Y. 375; BRONSON, J., in *People v.*

Statement of case.

Hopson, supra.) In Cro. Eliz. 699, the doctrine is tersely stated: "The act of an officer *de facto*, when it is for his own benefit, is void; because he shall not take advantage of his own want of title, which he must be consensant of; but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good." I have been unable, after a diligent examination, to find any case which sustains the claim that an illegal exercise of the power of appointment to office, by an executive officer, to fill an assumed vacancy, confers additional protection upon the appointee, because coupled with the fact of a prior summary removal of the rightful incumbent by the same officer, in the exercise of a *quasi* judicial discretion. In the *Dolan Case* (*supra*), the appointment of Keating was made under an ambiguous statute, under a claim of right, and was regular in form, but the court were of opinion that this would not protect him against a suit by the officer *de jure* to recover the salary received by him. We think there is no solid distinction between the cases. The defendant took the risk of the validity of his title, and the loss should fall upon him rather than upon the plaintiff.

Upon the whole case we are of opinion that the judgment should be affirmed.

All concur, except RAPALLO and MILLER, JJ., not voting.

Judgment affirmed.

THE PEOPLE, ex rel. JOHN SWINBURNE, Respondent, v. MICHAEL N. NOLAN, Appellant.

In an action under the Code of Civil Procedure, in the nature of a *quo warranto* (§§ 1933, 1948), in which the person alleged to be rightfully entitled to the office was joined with the people as relator, after final judgment against defendant and in favor of the claimant, the court, in June, 1883, upon motion allowed a supplemental complaint claiming damages in consequence of defendant's intrusion into the office, with leave to answer, and directing the action to stand over until a day named. *Held* no error; that under the provision of said Code (§ 1953,

Statement of case.

prior to its amendment by chap. 390, Laws of 1884), as it then stood, which authorized a recovery "in the same action against the defendant," of the damages sustained by the person entitled to the office, and under the provision of the Code allowing supplemental pleadings (§ 544), the order was justified.

The relator in such an action is entitled to recover as damages the salary or emoluments received by defendant while he unlawfully held the office.

As to whether, under any circumstances, these damages may be diminished, *quære*.

Taking the oath and a demand of possession of the office are not conditions precedent to the relator's right of recovery; it is not part of the plaintiffs' case to show that the relator was prepared to enter upon the duties of the office, nor is it any defense that conditions precedent to their performance have not been observed by him.

Merrill v. Village of P. (71 N. Y. 309), *People, ex rel. Williamson v. McKinney* (52 id. 374), distinguished.

(Argued February 9, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 6, 1884, which affirmed a judgment in favor of plaintiff.

This was an action in the nature of a *quo warranto*, to try the title to the office of mayor of the city of Albany.

The complaint alleged that the relator was duly elected to the office, and that defendant had illegally intruded into and usurped the same. The relief asked was that the relator be adjudged entitled to the office, and that a fine of \$2,000 be imposed upon the defendant. There was no allegation in the complaint averring or claiming damages. The issues joined were tried, and resulted in a verdict for the relator. Judgment was entered thereon. Afterward, and on June 29, 1883, upon notice and hearing of both parties, an order was granted, granting the plaintiffs leave to file and serve a supplemental complaint, claiming damages, with leave to the defendant to file an answer thereto, and that the action stand over to a day named.

E. Countryman for appellant. At common law, the writ

Statement of case.

and information in the nature of *quo warranto* were merely proceedings in behalf of the public to compel officers to produce and prove their official titles. There could be no judgment except of ouster or seizure, not even for costs. (*Ree v. Williams*, Mich. 31 G. 2; Bull. N. P. 211; 9 Anne, chap. 20, §§ 4, 5; 1 R. Laws, 108, 109, §§ 4, 5; 2 R. S. 582, 583, §§ 34-38; Code of Pro., §§ 428, 432, 434, 436, 439; Code of Civ. Pro., §§ 1983, 1948, 1953.) The Code of Civil Procedure has prescribed the exclusive rules of pleading and practice for all civil actions. (Code of Civ. Pro., §§ 478, 481, 484, 518, 1984.) The action to recover an office being an ordinary civil action, the same rules of pleading and practice prevail as in other actions. (*People v. Rider*, 12 N. Y. 433; *People v. Ransom*, 2 id. 490; *Moak's Van Santv. Pl.* 562; 787, 788; *Field v. Mayor of N. Y.*, 6 N. Y. 179, 189; *Bailey v. Rider*, 10 id. 363; *People v. Nolan*, 30 Hun, 484, 487; Code of Pro., § 428; Code of Civ. Pro., § 1983.) As there was no fraudulent usurpation of the office by the defendant, but as he held it in good faith, having reason to believe that he was elected, and under color of right, and actually discharged its duties while he drew the salary, etc.; and as there was no allegation or proof that the relator had ever qualified by taking the requisite oath of office, nor that he had ever demanded possession from the defendant, the defendant was entitled to retain the salary as against the relator. (*Stuhr v. Connor*, 44 N. J. L. 181; *Smith v. Mayor, etc.*, 37 N. Y. 518; *Wayne Co. v. Benoit*, 20 Mich. 176, 185; *Connor v. Mayor, etc.*, 5 N. Y. 285; *Queen v. Mayor, etc.*, 12 Ad. & El. 702; *Wilcox v. Smith*, 5 Wend. 231; *Plymouth v. Painter*, 17 Conn. 585.) It being found as a fact by the trial court that the defendant immediately after the charter election was duly declared to be elected to the said office of mayor by the common council, in whom such power was vested by law, and that he had duly qualified and discharged the duties of the office during the period for which he received the salary, he was clearly the *de facto* mayor, etc. (*Merritt v. Village of Port Chester*, 71 N. Y. 309, 312; *People, ex rel. Williams, v. McKinney*, 52 id. 374, 380; *Mc-*

Opinion of the Court, per DANFORTH, J.

Veany v. Mayor, etc., 80 id. 195; *People, ex rel. Zeiser, v. Kessel*, 10 Weekly Dig. 209; *Platt v. Stout*, 14 Abb. 178; *Mc Veany v. Mayor, etc.*, 80 N. Y. 185, 195.) The officer *de jure* may recover his damages for the wrong against the fixed usurper; and the amount of salary, if not the fixed measure, may be considered in assessing the damages. (*Dolan v. Mayor, etc.*, 68 N. Y. 282.)

Henry W. Johnson for respondent. At the time this action was commenced, and at the time it was tried, the law expressly provided that the damages of the relator might be recovered in the same action in which the title to the office is tried. (Code of Civ. Pro., § 1953.) Under the former Code a separate action was required. (*People, ex rel. Henderson, v. Snedecker*, 3 Abb. Pr. 233.) The proceedings in presenting to the court the question of the damages sustained by the relator were not only appropriate but were directly sanctioned by law, and they preserved every right of the defendant. (*People v. Hall*, 80 N. Y. 117; *People v. Thatcher*, 55 id. 529; *People, ex rel. Smith, v. Pease*, 30 Barb. 591; 1 R. L. 108, § 5; Revisers' notes to art. 2, tit. 2, chap. 9 of part 3, R. S.; Code of Pro., §§ 432, 435, 436, 437, 439; Code of Civ. Pro., §§ 1948, 1949, 1951, 1952, 1953, 1956; 2 R. S., marg. 583, § 36; 1 Tidd's Pr. 635; Gould's Plead. 37; *DeLisle v. Hunt*, 36 Hun, 620; 2 Wait's Pr. 468 and cases there cited.) There was no error in ordering judgment in favor of the relator for the amount of salary admitted in the defendant's answer to have been received by him after suit brought. (Code of Civ. Pro., § 1949; *State v. Porter*, 58 Iowa, 19; *Terhune v. Mayor, etc.*, 88 N. Y. 251; *Dolan v. Mayor, etc.*, id. 282; *U. S. v. Addison*, 22 How. [U. S.] 174; *Columbian Ins. Co. v. Wheelwright*, 7 Wheat. 534; *U. S. v. Addison*, 6 Wall. 292; *People v. Miller*, 2 Mich. 459; *Glasbeck v. Lyons*, 20 Ind. 1; *Mc Veany v. Mayor etc.*, 80 N. Y. 185.)

DANFORTH, J. The questions presented on this appeal were decided after much consideration by the judges of the Supreme

Opinion of the Court, per DANFORTH, J.

Court, and in the conclusion reached we concur. They relate *first*, to the form of procedure; *second*, to the measure of damages. The first is regulated by the Code, which in terms declares the writ of *quo warranto* and proceedings of like nature "to have been abolished," but provides that the relief formerly obtained thereby may be had by action where an appropriate action therefor is prescribed in that act (Code of Civ. Pro., tit. 1, chap. 16, art. 6, § 1983,) and, under its provisions, where, as in the present case, the relator is a claimant of the office, and a party to the action, the trial involves his right as well as that of the defendant, and judgment may be rendered upon the rights of both, or only upon the right of the defendant, as justice requires. (§ 1949.) If the former, and final judgment was in favor of the claimant, then as the law stood when these proceedings were pending, he might recover in *the same* action against the defendant, the damages which he had sustained in consequence of the defendant's usurpation or intrusion into and unlawful holding or exercise of the office. (§ 1953.) Prior to this enactment, the damages were recoverable "by action" (Code of Pro., § 439), and afterward by amendment in 1884, the section referred to (§ 1953) was changed so as to restore the reading of the former act, and the remedy under it would no doubt be by a new and original action. The difficulty in the present case grows out of the peculiar reading of the statute in force when the question arose. But its language was plain, and permissive, if not imperative. It was no doubt intended to assimilate the new practice to the remedy given by the Revised Statutes, through which the successful relator could, by a suggestion made and filed within one year after judgment in the *quo warranto* proceedings and trial, upon issue joined therein, recover the damages which he might have sustained by reason of such usurpation. (1 R. S., tit. 2, pt. 3, chap. 9, §§ 34-38.) That mode of practice, however, was abolished not only by the general language of the Code above cited, but by the express repeal of the statute which formulated it (Laws of 1877, chap. 417; Laws of 1880, chap. 245), and section 1953 of the Code (*supra*), as originally enacted,

Opinion of the Court, per DANFORTH, J.

appears to have been framed to take its place. If there be an omission to fully carry out that intention by new legislation, it was still the duty of the court, if possible, to apply the general rules of pleading in such manner as to make effectual the privilege given by the section in question, and prevent a failure of justice. It was so declared by the Code of Procedure (§ 468), which, in cases not provided for, permitted a resort to the practice theretofore in use. That section is not to be found in the present Code, and it might, therefore, be expected that under the general provisions of the act, every statutory right may be completely protected and enforced. To that end, after verdict and judgment establishing the relator's right to the office of mayor, the court below, upon motion, allowed a supplemental complaint claiming damages in consequence of the defendant's intrusion into that office, with leave to answer, and directing the action to stand over until a day named. These things were done, and upon the issue so found, a trial was had and damages assessed. The appellant's objection is that the claim for damages should have been made in the original complaint, but concedes that if it had been, "that issue could not be tried until after judgment rendered in favor of his title to the office."

The question then is reduced to this: Whether the court had power to allow that to be done after judgment, which might without leave have been done before, but which at whatever time done could only be made available after a prior issue had been disposed of. We think it had. The allegations essential to the claim for damages were not material upon the former issue, and if inserted in the original complaint, would not have affected it. By the Code (§ 544), a supplemental pleading in any action can be allowed in addition to the former pleading, setting up facts occurring, and a judgment rendered subsequent thereto, determining the matters in controversy, or a part thereof. It may well be that these general provisions were deemed sufficient to include the authority conferred by the Revised Statutes in the special case of a *quo warranto*. But whether they were or not, we think they justify the order of

Opinion of the Court, per DANFORTH, J.

the court in this case. The Code required the damages, if any, to be assessed in the "same action," but did not limit the power of the court to allow allegations in regard thereto, at such time as a just regard to the rights of the parties seemed to require, or even to devise a new form of proceeding, if necessary, to carry into effect its power and jurisdiction.

As to the second question: The charter of the city of Albany provided for the election of mayor, the duration of his office for the term of two years, commencing on the first Tuesday of May next after his election, and declared that he should "receive an annual salary of \$3,500, to be paid monthly by the chamberlain." (Laws of 1870, chap. 77, tit. 4, § 1.) The judgment in this case determines that the office of mayor legally vested in the relator by virtue of an election held on the 11th of April, 1882; that the defendant was not then elected, but at the commencement of the action (May 2, 1882), was and since has been wrongfully holding that office. By his answer the defendant admits the receipt from the chamberlain of the salary pertaining to the office of mayor, to the amount of \$4,005.43, from May 2, 1882, to the 22d of June, 1883, three days before the judgment of ouster went against him. This sum has been adjudged to the relator. We think properly. By section 1949 of the Code of Civil Procedure, the defendant, upon the receipt of the emoluments of office, and proof of the existence of such facts as have now been conclusively established, was liable to arrest on the application of the plaintiff, and the damages sustained by the relator, for which a recovery is permitted in the same action by section 1953, must be those of like character. Indeed it is difficult to see what other damages could be allowed in such a case.

The learned counsel for the appellant argues that taking the oath of office and demand of possession of the office were conditions precedent to the relator's right of recovery. The statute is otherwise. By the election he was rightfully entitled to the office, and for that reason properly joined with the people in the action against the intruder. (§ 1949, Code of Civ. Pro.)

Opinion of the Court, per DANFORTH, J.

It was not part of the plaintiff's case to show that he was prepared to enter upon its duties, nor is it any defense that conditions precedent to their performance had not been observed. If the action were against the city for salary, the question would be different, and the cases of *Merritt v. Village of Port Chester* (71 N. Y. 309), and *People, ex rel. Williamson, v. McKinney* (52 id. 374), referred to by the appellant, might be pertinent. Here they have no application, while that of *Mc Veany* (80 N. Y. 195) aids the respondent. It must, in view of that and other cases, be conceded that payment by the city to Nolan, while holding the office and discharging its duties, would be a defense to an action brought against it by the rightful officer to recover the same salary, but as between that officer and Nolan, the salary has been properly deemed to have been wrongfully received by the latter, and that for it he should make restitution. In *Dolan v. Mayor, etc.* (68 N. Y. 274), it was said that the amount of salary, if not the fixed measure, might be considered by the jury in assessing the damages. In *Terhune v. Mayor, etc.* (88 N. Y. 247), the remedy suggested was an action against the intruder "to recover the salary." To the same effect is the *Mc Veany Case* (*supra*), and while all three treat the services rendered as the consideration of a right to the salary, they regard those services when rendered by an intruder, as voluntarily performed and to be "counted for the good" of the rightful claimant, and in the *Dolan Case* (*supra*) it is also said that if an officer merely *de facto*, obtains compensation for that service he is liable in an action for money had and received by the officer *de jure* to recover it. So in the case of *The United States for the use of Cranford v. Addison* (6 Wall. 291), where the facts were quite like those before us, it was held that the measure of damages in such an action was the salary received by the intruding party. Such also is our decision in *Nichols v. McLean*, just (February 27, 1886) decided.* If, under any circumstances, they may be diminished, no foundation was laid for such inquiry in the court below, nor do facts warranting it appear here.

* *Ante*, p. 526.

Statement of case.

We think the appeal should fail and the judgment of the court below be affirmed, with costs.

All concur.

Judgment affirmed.

FREDERICK BENZING, Appellant, v. STEINWAY AND SONS. Respondents.

A master may not exempt himself from liability for an omission of the duty resting upon him to furnish, for the use of his servants, safe, sound and suitable tools, implements, appliances and machinery, by delegating its performance to another; the latter stands in the place of the master in discharging the duty, and for his neglect therein the master is responsible.

Plaintiff, an employe in defendant's factory, was called from his work to assist in putting up girders to support a roof in another part of the factory. This was not in the line of his general employment, and he had no previous knowledge of the appliances used in the prosecution of the work. He was ordered by the foreman to get upon a platform; he asked the foreman if it was safe, and was assured by him that it was. Plaintiff went upon the platform; one of the boards composing it, which was defective, broke, and he fell and was injured; he had no opportunity to examine the platform, and the evidence left it in doubt whether, upon an examination, the defect could have been discovered. In an action to recover damages for the injury, the complaint was dismissed on the ground that the neglect, if any, was that of a co-servant, for which the master was not liable. *Held* error.

(Argued February 10, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made November 9, 1883, which affirmed a judgment in favor of defendants, entered upon an order dismissing plaintiff's complaint on trial.

This action was brought to recover damages for injuries alleged to have been caused by defendants' negligence.

The material facts are stated in the opinion.

101	547
112	237
101	547
123	4

101	547
126	110
126	574

101	547
148	878

101	547
165	427
165	429

101	547
173	13
173	472

Statement of case

Wm. H. Arnoux for appellant. The court erred in dismissing the complaint; the case should have been submitted to the jury. (*Plank v. N. Y. C., etc., R. R.*, 60 N. Y. 607; *Mehan v. Syracuse, etc., R. R. Co.*, 73 id. 585; *DeForest v. Jewett*, 88 id. 269; *Ellis v. N. Y., etc., R. R. Co.*, 95 id. 546, 553; *Salters v. D. & H. C. Co.*, 3 Hun, 338.) The maxim *qui facit per alium, facit per se*, applies to a master in providing machinery and appliances for the use of his servants, and he is estopped from denying liability in case of injury resulting from defects therein while used in his service. (*Cone v. D., L. & W. R. R. Co.*, 86 N. Y. 206, 210; *Fuller v. Jewett*, 80 id. 46; *Mann v. President, etc.*, 91 id. 501; *Murphy v. B. & A. R. R. Co.*, 88 id. 146, 151; *Slater v. Jewett*, 85 id. 61, 70, 71; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521; *Holmes v. Clark*, 10 Wend. 405; *Kain v. Smith*, 80 N. Y. 458; 25 Hun, 148; *Corcoran v. Holbrook*, 59 N. Y. 517, 520; *Dobiecki v. Sharp*, 88 id. 208; *Hoffnagle v. N. Y. C. R. R. Co.*, 55 id. 610; *Flike v. B. & A. R. R. Co.*, 53 id. 553; *DeGraff v. N. Y. C., etc., R. R. Co.*, 76 id. 125; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 182; 44 Am. Rep. 573; *Hough v. Texas & P. R. R. Co.*, 100 U. S. 213; 9 Am. Rep. 93; 11 Fed. Rep. 621; *Hough v. Ry. Co.*, 100 U. S. 213; *Wabash Ry. v. McDaniel*, 107 id. 454.) The implied contract to have the machinery in such safe and proper condition as not to expose the servant to unnecessary risk is the foundation of the master's liability. (*Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 506, 511; *Chicago & Alton R. R. Co. v. Shannon*, 43 Ill. 338; *C. & N. W. R. R. Co. v. Sweet*, 45 id. 197; *Schooner Norway v. Jursen*, 52 id. 373; *Ill. C. R. R. Co. v. Welch*, id. 183; *C. & N. W. R. R. Co. v. Sweet*, 45 id. 197; *C., B. & Q. R. R. Co. v. Gregory*, 58 id. 272; *Ryan v. C. & N. W. R. R. Co.*, 60 id. 171; *Miller v. U. P. R. R. Co.*, 12 Fed. Rep. 600; *Toledo, W. & P. R. R. Co. v. Conroy*, 61 Ill. 162; *C. & N. W. R. R. Co. v. Taylor*, 69 id. 461; 8 Me. 641; *Wabash & West. R. R. Co. v. Fredericks*, 71 Ill. 294; *Toledo, W. & W. Ry. Co. v. O' Connor*, 77 id. 391; *Baker v. Alleghany Valley R. R. Co.*, 95 Penn. St. 211; *Howard Oil Co. v. Farmer*, 56 Tex. 452; *Paulmeier*

Statement of case.

v. *Erie R. Co.*, 34 N. J. L. 151; *C. & N. W. R. R. Co. v. Miranda*, 93 Ill. 302; 34 Am. Rep. 168; *Priestly v. Fowler*, 3 M. & W. 1; *Hayden v. Smithfield Mfg. Co.*, 29 Conn. 548; *Griffin v. Godwin*, 3 Hen. & Munf. 648; *William v. Clough*, id. 257; *Patterson v. Wallace*, 28 L. & E. 48; *Skip v. E. Counties Ry. Co.*, 24 id. 396; 9 Exch. 228; *Albro v. Agaroom C. Co.*, 6 Cush. 75; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Feltham v. England*, L. R., 2 Q. B. 33; *Murphy v. Smith*, 19 C. B. [N. S.] 361; *Galagher v. Piper*, 16 C. B. 669, 672; *Pantzar v. Tilly Foster Mining Co.*, 99 N. Y. 368.) The duty of the master to the servant, or his implied contract with his servant, leads to the result that the servant shall be under no risks from imperfect or inadequate machinery. (*Priestly v. Fowler*, 3 M. & W. 1; Comyn's Dig., "Master and Servant," K.; 2 Term R. 154; Viner's Abr. "Master and Servant," B 9; *Tuberville v. Stamp*, Comb. Rep. 459; 1 Blackst. Com. 431; Paley on Agency, 294, 295; *C. & N. W. R. R. Co. v. Miranda*, 93 Ill. 302; 34 Am. Rep. 168; Story on Agency, § 452.) The superintendent whose orders the plaintiff obeyed was not a fellow servant. (*Brick v. Rochester, etc., R. R. Co.*, 98 N. Y. 211, 212, 216; *Crispin v. Babbitt*, 81 id. 516; *McCosker v. L. I. R. R. Co.*, 84 id. 77; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; 44 Am. Rep. 573.) Where the superior directs the doing of an act the servant does not contribute, in a legal sense, to the injury resulting from obedience. (*Gibson v. Erie R. Co.*, 63 N. Y. 449; *Kain v. Smith*, 25 Hun, 148; *Miller v. Union P. R. R. Co.*, 12 Fed. Rep. 600; *Lalor v. R. R. Co.*, 52 Ill. 401; *O'Neil v. R. R. Co.*, 9 Fed. Rep. 337, § 432; *Mich. C. R. R. Co. v. Smithers*, 7 N. W. Rep. 991; *Porter v. Han. & St. J. R. R. Co.*, 71 Mo. 68; *Bucher v. N. Y. C., etc., R. R. Co.*, 98 N. Y. 128; *Salter v. Utica, etc., R. R. Co.*, 88 id. 49; *Morrison v. Erie R. Co.*, 56 id. 302; *Filer v. N. Y. C. R. R. Co.*, 49 id. 52; *Morris v. I. & St. L. R. R. Co.*, 10 Bradw. [Ill.] 396.)

G. W. Cotterill for respondents. The liability of the master, even to a stranger, except for his own torts, can only be justi-

fied as an exception on the ground of public necessity. But when that exception is extended to embrace cases where the person injured, instead of being a stranger to the agency, is himself a part of it, it fails almost entirely. (Story on Agency [9th ed.], §§ 453, 535; *Sherman v. Rochester & Syr. R. R. Co.*, 17 N. Y. 157.) A master is not responsible to those in his employ for injuries resulting from the negligence or misconduct of a fellow servant engaged in the same general business. (*Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 564.) The rule exempting the master is the same, although the grades of the servants or employees are different. (25 N. Y. 564; Story on Agency [9th ed.], 536; *Malone v. Hathaway*, 64 N. Y. 9.) It is not necessary, in order to bring the case within the exemption, that the servants should be engaged in the same work. It is enough if they are engaged in a common enterprise tending to accomplish the same general purposes, as operating a factory or railroad. (*Wright v. N. Y. C. R. R. Co.*, *supra*.) The master is only liable to his servant for his own misconduct or personal negligence. (*Wright v. N. Y. C. R. R. Co.*; Wood on Mast. & Serv., §§ 744, 755, 756, 791.) If the servant sustaining an injury through the unskillfulness of his fellow servant has the same knowledge of the unskillfulness or deficiency of the materials as his employer, he cannot sustain his action. (*Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 564; Wood on Mast. & Serv., § 744.) It cannot be claimed that the engineer was the *alter ego* of the defendants. (*Malone v. Hathaway*, 64 N. Y. 12.)

RUGER, Ch. J. The evidence of the circumstances surrounding the accident, and the prior use of the platform occasioning the same, is quite meagre and unsatisfactory; but standing unexplained was quite sufficient to carry the question of plaintiff's contributory negligence to the jury. He was unexpectedly called from his work in another part of the factory, to assist in putting up girders to support a roof in course of erection over the boiler-room. This duty was not in the line of his general employment, and his evidence shows that he had no previous knowledge of the status of the work, or of the appliances used

Opinion of the Court, per RUGER, Ch. J.

in its prosecution. A platform, consisting of five pine boards painted red, and being one inch thick, fastened together by two hard-wood cleets attached to the boards with screws, and forming a flooring, about four feet six inches wide (the length is not shown), was placed in such a position as to be supported by the wall on one side, and an iron beam three feet therefrom on the other, and extending over a vault about eleven feet deep. It was raining on the day of the accident, and when the plaintiff appeared in the yard, about on a level with the platform, he was ordered by the foreman to get upon it for the purpose of aiding other servants of the defendant, who were then present and ready to proceed in the work of placing the girders in position. The plaintiff asked the foreman if it was safe, and was informed, that it was.

It is quite evident that the plaintiff, had no opportunity to inspect the platform, for the purpose of discovering defects in its material or structure before going upon it, and even if he had made such examination, it is quite doubtful whether he could have discovered them, on account of the painted surface, and the difficulty of inspecting its lower side as it was then situated. He advanced upon it to the place where his services were needed, when the board broke and precipitated him into the vault below, and a serious injury resulted.

This statement of the case does not show as matter of law, that the plaintiff was chargeable with negligence in going upon the platform. The complaint was not, however, dismissed at the circuit for that reason, but upon the ground that the evidence did not show the platform, to have been furnished by the defendants for the use to which it was put, and that it appeared to be an instrumentality adopted by a fellow servant without the knowledge or consent of the employer. The neglect, if any, was said to be that of a co-servant, for which the master was held not to be liable. The General Term seems to have taken a similar view of the case, and, therefore, affirmed the judgment. In this we think those courts erred, and that a new trial should be granted.

It has been repeatedly held that the risks of the service which

Opinion of the Court, per RUGER, Ch. J.

a servant assumes, in entering the employment of a master are those only which occur, after the due performance by the employer, of those duties which the law enjoins upon him, and that the negligence of the master co-operating, with that of a servant in producing injury to a co-servant, renders the master liable. (*Stringham v. Stewart*, 100 N. Y. 516 and cases cited.) It was said by Chief Judge CHURCH, in *Flike v. B. & A. R. R. Co.* (53 N. Y. 549), that the true rule "is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed." Judge RAPALLO states the rule in *Crispin v. Babbitt* (81 N. Y. 521), to be that it depends "upon the character of the act in the performance of which the injury arises without regard to the rank of the employe performing it. If it is one pertaining to the duty the master owes to his servants he is responsible to them for the manner of its performance." The rule is unqualified that a master is bound to use all reasonable care, diligence and caution in providing for the safety of those in his employ, and furnishing for their use in his work safe, sound and suitable tools, implements, appliances, and machinery in the prosecution thereof, and keeping the same in repair. This is the master's duty and he cannot exempt himself from liability for its omission, by delegating its performance to another, or having required work to be done, by omitting precautions and inquiries, as to the time and manner of its performance. (*Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; *Corcoran v. Holbrook*, 59 id. 517; *Slater v. Jewett*, 85 id. 61; *Pantzar v. Tilly Foster Mining Co.*, 99 id. 368.)

The master is chargeable ordinarily, with knowledge of the means necessary to be employed in performing his work, and when their procurement and selection, is delegated to a servant he stands in the place of the master in discharging those duties; and the servant's neglect in that office, is chargeable to the employer, as an omission of duty enjoined upon him.

Opinion of the Court, per RUGER, Ch. J.

(*Ellis v. N. Y. Cent. R. R. Co.*, 95 N. Y. 546; *Slater v. Jewett*, 85 id. 61.)

Ignorance by the master of defects in the instrumentalities used by his servants, in performing his work, is no defense to an action by the employe who has been injured by them, when by the exercise of proper care and inspection, the master could have discovered and remedied the defects, or avoided the danger incident therefrom.

The evidence in the case, fails to disclose the previous history of the structure used as a platform, but it appears that it was already manufactured and had lain for some time previous to the accident over the boiler in the boiler-room. It was apparently made of sound lumber, and upon a casual examination would seem to have been safe, for the purpose for which it was used. An examination of it, however, after the accident disclosed, that the broken board had a knot of about two inches in diameter near its center, which must have impaired its safety for use as a platform. The under part of the board was unpainted, and the existence of the knot was presumably open to discovery upon a casual inspection of the platform, before it was placed in position.

We think that it was within the province of the jury, upon the evidence appearing in the record, to pass upon the question of the defendant's negligence, in using the structure described for a platform, and that it was error to dismiss the complaint. (*Feltham v. England*, L. R., 2 Q. B. 46; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; *Manning v. Hagan*, 78 id. 615.)

The judgment of the court below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

101	554
114	183
101	554
134	449

MARY SCHMITTLER, Appellant, v. ADAM SIMON, Respondent.

An administrator or executor who makes, indorses or accepts negotiable paper is personally liable thereon, although he adds to his signature the name of his office; he cannot bind the assets of the deceased by his contracts.

The mere mention of a fund in a draft does not necessarily deprive it of the character of negotiable paper; it is only where there is a direction, express or implied, to pay it from the fund, and not otherwise, that it will have that effect.

A draft drawn upon an executor of the estate of the mother of the drawer contained an absolute direction to pay a fixed sum at a specified date, with interest to the payee or order; then followed these words, "and charge the amount against me, and of my mother's estate." The draft was accepted by the executor, the word "executor" being added to his signature. In an action upon the acceptance, *held*, that the reference in the draft to the estate was not a direction to pay out of it, but it was simply referred to as a means of reimbursement; that the instrument was valid as a bill of exchange, and that the defendant was liable absolutely and individually.

Tooker v. Arnoux (76 N. Y. 397), distinguished.

(Argued January 22, 1886; decided March 2, 1886.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, made March 21, 1883, which affirmed a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on trial.

The nature of the action and the material facts are stated in the opinion.

Wm. W. Jenks for appellant. The instrument sued upon is a bill of exchange. (Pothier, Blackstone, Kent, Edwards and Story; *Luff v. Pope*, 5 Hill, 416; 1 Pars. on Notes and Bills, 323; *Convren v. Luddy*, 31 Penn. St. 509; 6 B. Monr. 179; 4 Den. 358; 2 Wheat. 385; 3 Shepl. 131; 9 Watts, 359; Byles on Bills, 245; *Mich. Bk. v. Stratton*, 3 Abb. Ct. App. Dec. 270; Story on Bills, chap. 5, p. 184; *Laing v. Barclay*, 1 Barn. & Cress. 398.) The word "executor," both in the body of the instrument and after the signature of the acceptor, is

Statement of case.

simply *descriptio personæ*, and as the addition did not bind a principal, the acceptor is individually bound. (*Connor v. Clark*, 12 Cal. 168; *Hill v. Bannister*, 8 Cow. 31; *Foster v. Fuller*, 6 Mass. 758; *Thatcher v. Dinsmore*, 5 id. 299; *Robertson v. Banks*, 1 S. & M. 666; *Cornthwaite v. First Nat. Bk.*, 57 Ind. 265; *Mills v. Kuykendall*, 2 Blackf. 47; *Carter v. Thomas*, 3 id. 213; *Ranney v. Adm. of Johnson*, 8 Wend. 500; *Ferrin v. Myrick*, 41 N. Y. 316; *McEldery & Chapman v. McKenzie*, 2 Port. [Ala.] 33; *Windom v. Bleecker*, 52 Ill. 342; *Davis v. French*, 20 Me. 21; *Tryon v. Oxley*, 3 Iowa, 289; *Austin v. Monroe*, 47 N. Y. 360; Pars. on Notes and Bills, 161; Story on Bills, § 47; Story on Prom. Notes, § 63; *Tasso v. Church*, 4 W. & S. 346.) Admitting that the consideration of the instrument sued upon is a debt of a testator represented by the defendant, and a legacy or a portion to be due an heir in either case, its acceptance is an admission of assets, and the forbearance to sue would make it a valid individual obligation. (*Johnson v. Gardiner*, 10 Mod. 254; *Bradley v. Heath*, 3 Sim. 543; *Davis v. Reyners*, 2 Lev. 3; *Childs v. Morrison*, 2 Brod. & Bing. 462; *Liverpool Borough Bk. v. Walker, Zex & Jones*, 29; *Liskman v. Allen*, 3 E. D. Smith, 564.) The promise to pay interest upon the draft sued upon made it, under any contingency, a personal obligation of defendant. (*Sims v. Stillwel*, 3 How. [Miss.] 176; *Powell v. Graham*, 7 Taunt. 581; *Childs v. Morris*, 6 Eng. C. L. 200; Chitty on Cont. 84; *Davis v. Reyners*, 2 Lev. 3.) The direction at the close of the instrument "and charge the amount against me, and of my mother's estate," is directory between drawer and drawee as to where amount paid is to be charged. (Chitty on Bills, 162; Bouv. L. D., tit. Bills of Exch.; Byles on Bills, 86; *McLeod v. Snee*, 2 Strange, 762; *Coursen v. Ledder*, 31 Penn. St. 506; *Kelly v. Mayor of Brooklyn*, 4 Hill, 263; 1 Daniels on Neg. Instr., § 51; *Hollister v. Hopkins*, 13 Hun, 210; *Munger v. Shannon*, 61 N. Y. 251; *Ridman v. Adams*, 51 Me. 429; 1 Edw. on Notes and Bills, § 158.)

Opinion of the Court, per RUGER, Ch. J.

Joseph B. Reilly for respondent. Defendant's acceptance of the draft in the capacity of executor of the estate does not bind him individually. (*Bk. of Troy v. Topping*, 9 Wend. 273; Story on Notes, § 63; Story on Bills, § 74; Edwards on Bills, 79; 1 Daniels on Neg. Inst., §§ 255, 263; *Lake v. Trustees, etc.*, 4 Den. 520; *Kingsberry v. Pettis Co.*, 48 Mo. 207; *Tooker v. Arnoux*, 76 N. Y. 397.) The draft in suit was non-negotiable, as appears upon its face, it was chargeable against a certain fund, that is, the interest of the drawer in his mother's estate; hence, the plaintiff is in no better condition than the payee named therein. (*Cook v. Satterlee*, 6 Cow. 108; *Skilen v. Richmond*, 48 Barb. 428; 1 Daniels on Neg. Inst., § 263; Story on Prom. Notes, § 63; 1 Pars. B. & N. 161.) It can be only construed as an equitable assignment of sufficient of that interest to pay the amount set forth in the instrument. (*Wells v. Williams*, 39 Barb. 567; *Richardson v. Rust*, 9 Paige, 243; *Vreeland v. Blunt*, 6 Barb. 182.) When a party accepts a draft of this character in a representative capacity, and such fact be known, then he is only liable in such representative capacity. (44 N. Y. 395; 15 Johns. 1; 6 How. Pr. 1; 17 Johns. 301; 1 Cow. 514; *Brockway v. Allen*, 17 Wend. 40; *Seaber v. Hawkes*, 5 Moore & Payne, 549.) The only construction that can be given to the words in the draft "and of my mother's estate," is that the drawer directed the executor to pay \$900 of the estate of his mother. (*Gallery v. Cushman*, 14 Barb. 186; *Tooker v. Arnoux*, 76 N. Y. 397; *Schoonmaker v. Roosa*, 17 Johns. 300.) It is not a positive promise to pay; at the most it is a conditional promise, dependent upon the extent of William J. Scharen's interest in his mother's estate. (1 Pars. on B. & N. 161; Story on Bills, § 47; Story on Notes, § 63.)

RUGER, Ch. J. The plaintiff claimed to recover as the holder of a draft, drawn upon and accepted by the defendant, reading as follows:

"NEW YORK, February 26, 1877.

"Mr. Adam Simon, executor, will please pay to Johannes

Schmittler or his order, on the first day of July, which will be in the year 1879, the sum of \$900, with seven per cent interest, to be paid besides this amount yearly, July month, and charge the amount against me and of my mother's estate.

“WILLIAM J. SCHAREN.”

Written upon the face: “Accept, Adam Simon, executor,” and indorsed, “Pay to the order of Mary Schmittler, the amount of note. JOHANNES SCHMITTLER.”

Upon the trial, after proving the execution of the draft, its acceptance and transfer, and offering to prove the payment of a consideration by the plaintiff to the payee, which was objected to by defendant, and excluded by the court, the plaintiff rested. The defendant thereupon moved to nonsuit upon the ground that the obligation was not binding upon the defendant personally, but he was liable thereon, if at all, in his representative character alone, and that it was payable out of a specific fund, and a recovery thereon, could not be had without proving the existence and extent of such fund. The court thereupon nonsuited the plaintiff, to which decision she excepted. The General Term having affirmed the determination of the trial court, the plaintiff took this appeal.

We think the court below erred as to both of the grounds upon which their judgment proceeded. That the defendant was liable upon the draft, if liable at all, in his individual capacity alone, seems under the authorities to admit of no doubt.

Neither executors nor administrators have power to bind the estate represented by them through an executory contract, having for its object the creation of a new liability, not founded upon the contract or obligation of the testator or intestate. They take the personal property as owners and have no principal behind them for whom they can contract. The title vests in them for the purposes of administration, and they must account as owners to the persons ultimately entitled to distribution. In actions upon contracts made by them, however they may describe themselves therein, they are personally liable, and in actions thereon the judgment must be *de bonis propriis*.

Not so, however, upon contracts made by their testator or intestate; in such case the judgment is always *de bonis testatoris*. (*Gillet v. Hutchinson's Adm.*, 24 Wend. 184; *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Monroe*, 47 id. 360, 366.)

The action here is exclusively upon the undertaking of the defendant, importing a promise to pay the sum of \$900 on the 1st day of July, 1879, to the payee of the draft or his order for a consideration received by the promisor. No facts are alleged or proved, showing any liability on the part of the defendant's testator to the drawee of the draft, or any legal demand existing in his favor, against the estate represented by the defendant.

It follows that the obligation must be held to be the individual contract of the defendant, and enforceable as such by a judgment against him, and execution to be levied *de bonis propriis*, or it is *nudum pactum* creating no liability whatever.

The cases are very numerous to the effect that the addition of an official character, to the signatures of executors and administrators, in executing written contracts and obligations has no significance, and operates merely to identify the person and not to limit or qualify the liability. Thus it was held in *Piney v. Administrators of Johnson* (8 Wend. 500), that a bond given by administrators in their representative capacity to a creditor for a debt of their intestate, was the individual obligation of the administrators and enforceable against them *de bonis propriis* only; that the description of the obligors in the bond as administrators, and their promise in that character was surplusage, and they were chargeable upon such a bond only in their personal capacity. (See, also, *Gould v. Ray*, 13 Wend. 633.) Parsons on Bills and Notes, vol. 1, page 161, lays down the rule that "an administrator or executor can only bind himself by his contracts; he cannot bind the assets of the deceased. Therefore, if he make, indorse or accept negotiable paper, he will be held personally liable, even if he adds to his own name the name of his office. Signing a note for example, 'A. as executor of B,' for this will be deemed only a part of his description or will be rejected as surplusage." To similar effect are *Pum-*

Opinion of the Court, per RUGER Ch. J.

pelly v. Phelps (40 N. Y. 59), *Taft v. Brewster* (9 Johns. 334), *Forster v. Fuller* (6 Mass. 58), *Hills v. Banister* (8 Cow. 31), *Thatcher v. Dismore* (5 Mass. 299), *Cornthwaite v. First Nat. Bank* (57 Ind. 268).

Being of the opinion, therefore, that the defendant is liable upon the draft in question in his individual capacity alone, the question still remains as to the extent of such liability. He was undoubtedly competent to enter into a personal contract in reference to the funds in his possession, and in such case would be bound to perform according to the tenor and legal effect of the obligation assumed by him, and entitled to be allowed the amount paid upon an accounting, as executor. Such instruments are subject to the rules of construction applicable to other contracts, and must be interpreted upon consideration of the language used by the parties, with a view of arriving at their intention in executing them. The court below held that the draft in question was payable only from a particular fund, and was, therefore, non-negotiable, and enforceable only to the extent of the fund referred to.

Considering the question as we are compelled to do from the language of the instrument alone, we are unable to agree to the interpretation thus put upon it. It is not claimed that there is any distinction between the instrument in question and an ordinary bill of exchange except that made by the clause referring to the mother's estate. Unless that clause deprives the paper of its commercial character, the rights and liabilities of the parties thereto must be governed by the rules pertaining to negotiable securities, which would render the defendant liable for the amount named in the draft, upon the theory that his acceptance was an admission by him of assets applicable to its payment.

The distinction between a fund from which a draft or order is directed to be paid, and one referred to as the means of reimbursement to its drawee, is a material one and cannot be disregarded in the construction of such instruments. Thus it is said: "When a reference is made to a special fund merely as a direction to the drawee how to reimburse himself, and the payment

Opinion of the Court, per RUGER, Ch J.

is not made to depend upon the adequacy of the fund, it will not vitiate the bill." (Edw. on Bills and Notes, § 158.) See, also, Parsons on Merc. Law, 87; Chitty on Bills, 158. DWIGHT, Com., in *Munger v. Shannon* (61 N. Y. 255), says: "A bill is an order drawn by one person on another to pay a third a certain sum of money absolutely and at all events. Under this definition the order cannot be paid out of a particular fund, but must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee may reimburse himself." Judge RAPALLO, in *Brill v. Tuttle* (81 N. Y. 457), says: "If a draft be drawn generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is to subsequently reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts." In that case the drawee refused to accept and the action was sought to be maintained upon the theory of an equitable assignment. It was held under the peculiar circumstances of the case, and the form of the instrument, that it did transfer the fund.

It is thus seen that the mere mention of a fund in a draft, does not necessarily deprive it of the character of commercial paper, but it must further appear in order to have that effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise.

The question, therefore, to be determined here is, whether the fund in question is referred to as the measure of liability or the means of reimbursement. While the point is not free from doubt, we think a reasonable construction of the draft favors the conclusion that it is mentioned only as the source of reimbursement. No express language in it can be pointed out as requiring its payment from the fund mentioned, and none from which that requirement can be implied, except such as

exists, in all drafts where a fund is referred to. Its language is to "charge the amount against me and of my mother's estate" and contains no provision for delay until the amount is realized from the estate, or for payment *pro tanto* in case the estate should prove insufficient to pay the whole amount. There is no language importing a transfer of the fund to the payee, and nothing from which such an intention can be inferred. The draft contains an absolute direction to pay a fixed sum, at a specified date, with interest. It imports a present indebtedness of a sum named, from the drawee to the payee, and an absolute direction to pay that sum at a fixed date, subject to no contingency either as to time or amount. In express language he directs the amount when paid to be charged against him individually, and adds the words, plainly implying, as we think, that the fund for the acceptor's reimbursement would be found in an amount eventually, or immediately payable to the drawer from his mother's estate.

We think, also, that the insertion of words expressly making the paper negotiable, was quite significant and indicated an intention on the part of all parties, that it should be transferable, and partake of the character of commercial paper. Any contingency inferable from the language of the draft, making the amount payable thereon indefinite and uncertain, would tend largely to depreciate its value for such purpose, and defeat the intention with which it was apparently made.

If the language of the paper could be considered at all ambiguous, it was the duty of the defendant to limit his liability by apt words of acceptance when it was presented to him, but as it is, he has unqualifiedly promised to pay a fixed and definite sum at a specified time, and we think, should be held to the contract which other parties were authorized by his acceptance to infer he intended to make. The case of *Tassey v. Church* (4 Watts & Sergeant, 346) seems quite in point. The instrument there read :

Opinion of the Court, per RUGER, Ch. J.

“\$555.48.

ALLEGHENY, 1st July, 1840.

“Please pay Church, McVay & Gordon \$555.48 and charge the estate of Thomas O. Patterson.

“ADAM FLEMMING, *Trustee*.”“To JOHN TASSEY, *Administrator*.Indorsed: “Accepted, JOHN TASSEY, *Administrator*.”

Fleming was the trustee of Mrs. Patterson, who was the heir at law of Thomas O. Patterson; TasseY was the administrator of Patterson's estate. It was held that the promise of the acceptor was unconditional and bound him absolutely. In *Childs v. Monins* (6 Eng. C. L. 228), the defendants, as executors of the estate of Thomas Taylor, promised to pay £200 on demand with interest, signing as executors. It was held that they became personally liable, and that the plea of *plene administravit* was no defense. It was further held that the promise to pay interest made the debt that of the administrators personally. In *Kelly v. Brooklyn* (4 Hill, 263), the action was upon an order drawn by the mayor upon the treasurer of defendant in the following words: “Pay Alexander Lyon or order \$1,500 for award No. 7, and charge to Bedford Road Assessment.” It was held that it was a bill of exchange and not payable from a particular fund. For further illustration of the point under discussion we would refer to *Hollister v. Hopkins* (13 Hun, 210); *Redmond v. Adams* (51 Me. 429); *Luff v. Pope* (5 Hill, 413). The case of *Tooker v. Arnoux* (76 N. Y. 397) is referred to by the respondent as sustaining the views of the court below; but we are of the opinion that it cannot be so regarded. The order there directed the drawee to pay a certain sum out “of the money to be realized from the sale” of certain houses. This order was accepted, and it was held that a sale of the houses was a condition precedent, to any liability on the part of the acceptor. This was the plain language of the contract.

In all the cases examined by us where an order has been held to operate as an equitable assignment of a fund, there were either special phrases contained in the instrument, indicating an

Statement of case.

intent to have it so operate, or ambiguous language used, which, construed in the light of surrounding circumstances, justified the inference of a limitation of liability. (*Parker v. Syracuse*, 31 N. Y. 376; *Alger v. Scott*, 54 id. 14; *Munger v. Shannon*, 61 id. 251; *Ehrichs v. DeMill*, 75 id. 370; *Brill v. Tuttle*, *supra*.) Here, however, there is no such language, and this contract is to pay a fixed amount at a specified date, absolutely and unconditionally.

We are, therefore, of the opinion that the instrument in question is a bill of exchange and rendered the parties executing it liable absolutely for the amount stated therein.

The judgment of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

SYLVESTER VIETS, Respondent, v. THE UNION NATIONAL BANK
OF TROY, Appellant.

101	563
119	302
101	563
124	331

Plaintiff, at the request of B., deposited certain moneys belonging to the latter, with defendant; he made the deposit, however, in his own name, to the credit of a deposit account he then had with defendant, and gave to B. two checks for the amount, which the latter, on February 22, 1869, indorsed and delivered to E. as part consideration for her promise to marry him. On the next day, proceedings *de lunatico inquirendo* were instituted against B. and an inquisition therein, held March tenth, adjudged him to be of unsound mind and that he had been, for a period of six months. Pending the proceeding, an order was made enjoining the defendant from paying over the moneys to any one. On March thirty-first an order was made confirming the inquisition and directing defendant to pay the said moneys to the committee thereby appointed, and on April fifteenth defendant complied with the order. On March sixth, one of the checks was presented to defendant for payment and refused. On March eighth B. was married to E. The other check was presented and payment refused August 28, 1871. In an action to recover the amount so deposited, *held*, that as the money belonged to B. when deposited, although the deposit was in plaintiff's name, it still remained the property of B. and the payment to the committee was a legal payment which

Statement of case.

discharged defendant; that, assuming there was an equitable right in E. to the money arising out of the ante-nuptial contract, such equity could not be invoked against the bank, it having no notice of the same when it made payment.

It seems that if any such equitable claim existed it could only be enforced in an action against the committee.

The committee so appointed brought an action against E. to set aside the marriage on the ground of the alleged lunacy of B. The trial resulted in a finding that, at the time of the marriage, B. was of sound mind and capable of entering into a marriage contract, and judgment was entered in favor of E. *Held*, that this did not affect the validity of the appointment of the committee or of the payment by defendant.

This action was brought in 1878. *Held*, that the right of action, if any existed, was barred by the statute of limitations; and this, although defendant had, within six years, paid checks drawn by plaintiff for the balance due him for moneys deposited on his own account, aside from the moneys in question.

While a check drawn by a depositor against a general bank account does not operate as an assignment of so much of the account, it authorizes the payee, or one to whom he has indorsed and delivered it, to make a demand, and a refusal of the bank to pay on presentation gives the drawer a right of action, in case he has funds in bank to meet the check and the refusal was without his authority.

The presumption is that a third person presenting a check payable to the order of and indorsed by the payee has authority to present it, at least so far as the drawer is concerned.

The implied contract between a bank and its depositors is that it will pay the deposits when and in such sums as are demanded, the depositor having the election to make the whole payable at one time by demanding the whole, or in installments by demanding portions; and whenever a demand is made by presentation of a genuine check in the hands of a person entitled to receive the amount thereof, for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises, and the statute of limitations begins to run as against the installment so made due and payable.

The provision of the Code of Civil Procedure (Subd. 3, § 414) excepting from the limitations contained therein a case where a person who, at the time said Code took effect, was entitled to commence an action or proceeding, and who commenced the same within two years thereafter, and making the provision of law previously in force, although then repealed, still applicable thereto, did not operate to extend the time for the bar of the statute of limitations to take effect; it merely left actions or proceedings brought within two years to be governed by the law in force when the Code went into effect.

Viets v. Union Nat. Bank (81 Hun, 484), reversed.

(Argued January 29, 1886; decided March 2, 1886.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made February 4, 1884, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 31 Hun, 484.)

This action was brought to recover a balance alleged to be due plaintiff on his deposit account with the defendant.

The material facts are stated in the opinion.

James Lansing for appellant. The bank, upon receiving the deposit, became debtor ostensibly to the depositor, but equitably to the real owner, and upon proper demand was liable to him. (*Van Allen v. Am. Nat. Bk.*, 52 N. Y. 1; *Stephens v. Bd. of Education*, 79 id. 183.) When it received notice that the fund in question was the property of Banker, it was its duty to hold it for his benefit. And it would have subsequently paid it to Viets at its peril. (52 N. Y. 1.) The plaintiff, having deposited the fund in accordance with the direction of the owner, was relieved from all liability for loss happening without his fault. (52 N. Y. 1; *Pennell v. Deffell*, 4 De Gex, M. & G. 372.) If a delivery of the checks did amount to an equitable assignment of the fund, then, according to the facts disclosed, Mrs. Banker became, on the 22d of March, 1869, the owner of the fund, and she alone could maintain the action. (*Risely v. Phoenix Bk. of N. Y.*, 83 N. Y. 318; *Coats v. First Nat. Bk. of Emporia*, 91 id. 20.) The inquisition found and the order made by the court thereon, directing the defendant to pay over the money in question to David A. Banker, committee, having been made by a tribunal that had jurisdiction of the person and property of the said John Banker, is binding upon him and his privies, and was sufficient to pass the title to his committee. (*Smith v. Smith*, 79 N. Y. 634; *Dezell v. Odell*, 3 Hill, 215; *Corkill v. Lander*, 44 Barb. 218; *Herman's Law of Estop.*, § 409; *Whart. on Ev.*, §§ 1087, 1151.) Assuming that plaintiff, in making the deposit, became and thereafter remained a creditor of the defendant, then we submit that this action is barred by the

Statement of case.

statute of limitation. (*Payne v. Gardner*, 29 N. Y. 146; *Powell v. Adams*, 68 id. 314; *Downs v. Phœnix Bk.*, 6 Hill, 297; *Oddie v. Nat. City Bk. of N. Y.*, 45 N. Y. 735, 743; *Carroll v. Cone*, 40 Barb. 220; *Farmers & Mech. Bk. v. Planters' Bk.*, 10 Gill. & J. 449; Wood on Lim. of Act. 40, 540; *Bk. of Mo. v. Benoist*, 10 Mo. 519; Angell on Lim. of Act., § 42; *Battley v. Falkner*, 5 E. C. L. 172; *Arnott v. Holden*, 22 L. J. Q. B. 19; *Whitehead v. Lord*, 21 L. J. Exch. 239; *McDonald v. Stohey*, 1 Mon. 338; Byles on Bills, 14, 21; 2 Daniel on Neg. Instr. 302, 310; Morse on Bk. and Bkg. 36, 529; *Mandeville v. Welch*, 5 Wheat. 356; *Marzetti v. Williams*, 1 B. & A. 414; *Rollins v. Stewart*, 78 E. C. L. 594; *Watts v. Christie*, 11 Beav. 546; *Bk. of Brit. No. Am. v. Mer. Nat. Bk. of N. Y.*, 91 N. Y. 106; *Murray v. Coster*, 20 Johns. 576, 586; *Rundele v. Allison*, 34 N. Y. 180; *Kelsey v. Griswal*, 6 Barb. 436; *Bruce v. Tillson*, 25 N. Y. 196.) An account stated can only be opened when the party objecting shows clearly that he has been misled by fraud, mistake or manifest error. (*Harley v. Eleventh Ward Bk.*, 76 N. Y. 618; *Thompson v. Bk. Brit. No. Am.*, 82 id. 7; *Lockwood v. Thorne*, 11 id. 170; 18 id. 294; Angell on Lim., § 150; *Peck v. N. Y. & Liv. U. S. M. S. S. Co.*, 5 Bosw. 236.) To take a case out of the statute, the part payment must be shown to have been a payment in part discharge of the particular debt sued for, and to have been so intended to recognize the debt in question as subsisting. (*Miller v. Talcott*, 46 Barb. 172; *Deyo's Ex'rs v. Jones' Ex'rs*, 19 Wend. 491.)

R. A. Parmenter for respondent. A check drawn upon a general deposit and delivered to a third person does not operate as a transfer or assignment of any part of the general fund, or create a lien at law or in equity upon the deposit. (*Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82, 87; *Dykers v. Leather Mfg. Bk.*, 11 Paige, 612; *Cowperthwaite v. Sheffield*, 3 N. Y. 251; *Chapman v. White*, 6 id. 412; *Tyler v. Gould*, 48 id. 682; *Atty.-Genl. v. Contl. L. Ins. Co.*, 71 id. 325; *Bk.*

Opinion of the Court, per MILLER, J.

of *Brit. No. Am. v. Merch. Nat. Bk. of N. Y.*, 91 id. 106.) The defense of the statute of limitation is not available to the defendant on this appeal under the proofs and the exceptions. (*Goillotel v. Mayor, etc.*, 87 N. Y. 441; *Downs v. Phoenix Bk.*, 6 Hill, 297, 299; *Payne v. Gardner*, 29 N. Y. 146, 171-172; *Rogers v. Weir*, 34 id. 463, 471; Story on Bailm. 66, § 88; *Risley v. Phoenix Bk.*, 88 N. Y. 318.)

MILLER, J. The controversy in this action arises in reference to certain moneys belonging to one John Banker, deceased, which were deposited with the defendant to the credit of the plaintiff. Previous to this time Banker was the owner of a bond and mortgage of about \$6,000, on a farm formerly belonging to him upon the sale of which the mortgage was executed. This mortgage he sold and received a check for the amount of the sale. On the 19th of February 1869, the plaintiff at Banker's request took his check to the bank, and had it cashed and from the proceeds paid an overdue note, upon which Banker was indorser of about \$600, gave Banker when he returned about \$200, and on the same day deposited the balance, \$4,867.83, with defendant in his own name. He then by direction of Banker, and on the same day, drew two checks payable to Banker, one for \$3,500 and the other for \$1,367, and delivered them to him. On the twenty-second of February these two checks were indorsed by Banker and delivered to one Ellen M. Houghtaling as part consideration for her promise of marriage with said Banker. On the twenty-third of February proceedings were instituted by David A. Banker, son of John Banker, in the nature of a writ *de lunatico inquirendo*, to inquire as to the lunacy of said John Banker, and a commission issued directing an inquisition to be held, and by virtue of said inquisition held March tenth, it was adjudged that Banker was of unsound mind and incapable of governing himself or managing his property and had been in such state of lunacy for a period of six months. Pending the proceedings an order was made by the court enjoining the bank from paying over to any one the money deposited with it until further order of the court.

Opinion of the Court, per MILLER, J.

On the thirty-first of March, an order was made confirming the inquisition, and directing the bank to pay over the money deposited to David A. Banker as committee of John Banker, and on the fourteenth of April the defendant, on receiving an indemnity bond, paid over to the committee accordingly. On the 6th of March, 1869, the check for \$3,500 was presented to the bank for payment and payment refused, and on the 28th of August, 1871, the check for \$1,367 was likewise presented for payment, and payment refused. On the 8th of March, 1869, John Banker was married to Ellen M. Houghtaling. After the above-named two checks were presented to the bank for payment, and payment refused, Mrs. Banker recovered a judgment against the plaintiff for the amount of the same. Banker died on the 14th of September, 1869, and after his decease an action was brought in the Supreme Court by his committee to set aside his marriage on the ground of his alleged lunacy. On the trial of the action, February 24, 1870, it was found that at the time of his marriage, March 8, 1869, Banker was not of unsound mind; that after his marriage he had lucid intervals, and in such lucid intervals recognized such marriage by cohabitation and otherwise, and that at the time of his death he was not of sound mind, and judgment was entered in accordance with these findings.

The plaintiff's right to recover in this action does not rest upon the ground that he was the owner of the money deposited in the bank or had any absolute title to the same. It clearly did not belong to him, and if this action can be maintained, it must be for the reason that the deposit in his name with the consent of Banker and the making and delivery of the checks under the circumstances stated, conferred upon him the right to enforce payment thereof against the bank.

As the money in the bank belonged to John Banker and the deposit was made by his direction, it mattered not that the deposit was made to the plaintiff's individual account, and in an action brought by the principal the bank could not set up a want of privity. (*Van Alen v. Am. Nat. Bk.*, 52 N. Y. 1.) We must, therefore, assume that the money deposited by the

plaintiff was the property of John Banker while it remained in the possession of the defendant.

Such being the case the question arises whether the payment which was made by the bank to the committee, who had been appointed by the Supreme Court in the proceedings against Banker as a lunatic, was a legal payment which discharged the bank from liability and bars the plaintiff's right to maintain any action for the same.

The law makes provision for the appointment of a committee of the personal estate of a lunatic and vests in such committee the right to possession of the estate, and after an adjudication of lunacy has been made and confirmed by the court, and a committee of his estate duly appointed and qualified, such committee occupies the same position and fills the same place as the lunatic in regard to his personal estate and property. He has the same control and possession thereof, and in all ordinary matters the right to deal therewith, as the lunatic enjoyed before he was found to be of unsound mind. The committee is the representative of the lunatic in respect to all matters connected with his estate.

When, therefore, on the 10th of March, 1869, in proceedings had against John Banker, the regularity of which is not disputed, a judgment of lunacy was obtained against him, and thereupon subsequently a committee appointed to take charge of his estate, he, Banker, became divested of all right to control his property in accordance with the findings under the inquisition had. That inquisition determined not only that he was a lunatic on said tenth day of March, but that he had been such for a space of six months previous. A short time after that, the committee, who had been duly appointed and qualified, applied to the defendant as the representative of Banker, to whom alone the money deposited by the plaintiff belonged, and, exhibiting his authority, demanded payment of the money and it was paid to him. Banker, who was the owner of the money, had no right to receive it, because he had been declared a lunatic and the committee was the only person whom the law recognized as having authority for such a purpose.

Even if it be assumed that there was an equitable right in Mrs. Banker to the money arising out of the ante-nuptial contract with her husband, such equity cannot be invoked as against the bank that had no notice of the same, and in good faith paid the money to the legal representative of the owner thereof. The bank is entitled to protection for the reason that it paid the money to one who apparently had the right to receive it. If any equitable claim existed in favor of any third party, it could only be prosecuted and enforced in an action against the committee who had received the money and not against the bank in contravention and repudiation of its right to pay which it had exercised in good faith to one ostensibly vested with lawful authority to receive the same. With this apparent lawful authority presented by the committee to the bank, it was not required to examine and determine the equities of other parties, of which it had no knowledge, to the fund, and it had a right to assume that the committee appointed by the court had full power to act. It must be conceded that if the adjudication of lunacy was in force at the time the payment was made, it was a valid and legal payment and an effectual bar to any claim by the plaintiff or any other person to recover the money of the defendant. Such adjudication, however, is assailed by the respondent's counsel, and it is insisted that the question of lunacy is out of the case because it was shown that the presumption of lunacy arising from the inquisition in the lunacy proceedings against John Banker, had been overcome and wiped out by the subsequent judgment in the equity suit brought by David A. Banker, the committee, against Ellen M. Banker, to declare the marriage contract null and void, whereby it was adjudged that at the time of his marriage on the 8th of March, 1869, John Banker was not a person of unsound mind, and therefore he must be regarded, for the purposes of this appeal, as a person of sound mind fully capable of managing his affairs and disposing of his property at the various times during which the transactions, out of which this controversy arose, transpired. We do not think that such was the effect of the judgment in the action referred to, and all that was established

Opinion of the Court, per MILLER, J.

thereby was the sanity and ability of Banker to enter into the marriage contract on the eighth of March, two days before the inquisition was held adjudging him a lunatic.

The other findings in the case, as we have seen, evince that Banker was of unsound mind after the eighth of March and at the time of his death. None of them are in conflict with the general finding of the inquisition that he was of unsound mind for six months prior to the time it was held. The only fact that was established by the verdict and judgment in the action to set aside his marriage was the sanity of Banker at the time he entered into the marriage contract, and this is entirely consistent with the finding of the inquisition that he was a lunatic two days afterward, and with the fact that he was such on the twenty-second of February, when the alleged transfer of the checks was made to Mrs. Banker.

It cannot, we think, be denied, in view of all the circumstances, that the judgment in the action referred to only covered the day of Banker's marriage, to which alone it had reference. This is entirely apparent from the previous inquisition, which had adjudged that he was a person of unsound mind and a lunatic long prior to his marriage. He was found to have been a lunatic for several months prior to that time by the first adjudication, and by the second that he was sane at the time of his marriage and had lucid intervals, but was of unsound mind at the time of his death. Taking all these facts in connection, there is no ground for claiming that Banker was not of unsound mind for a long period anterior to his marriage and after the same, with lucid intervals to the day of his death. Such being the case, the last adjudication could not affect the conclusion arrived at upon the inquisition and the appointment of the committee by reason thereof. To all intents and purposes during these transactions, with the single exception of the day of his marriage, Banker was a person of unsound mind, incapable of managing his affairs, and his acts during the transactions referred to were invalid and liable to be set aside on account of his lunacy. Whatever rights, therefore, existed in favor of Mrs. Banker or of the plaintiff could only be vindi-

cated by an action to obtain the money from the committee to whom it had been lawfully paid. Neither of these parties could ignore the effect of the findings, upon the inquisition, against Banker by an action against the defendant. Their remedy, if any existed, lay in a different direction, as we have seen, and it cannot be obtained in this present action.

It follows that the order appointing the committee, upon the findings of the inquisition, having been made by a tribunal that had jurisdiction of the person and property of the said John Banker, was binding upon Banker and his privies and sufficient to authorize the payment by the bank to the committee, and that the court erred in holding the defendant liable to the plaintiff for the amount of the two checks deposited with it by the plaintiff.

We are also of the opinion that the plaintiff's right to recover in this action, which was brought in 1878, was barred by the statute of limitations.

While it is true that a check drawn against a general bank account does not operate as an assignment, and that, as a general rule, the holder cannot maintain an action against the drawee because of want of privity, it is equally true that the giving of a check authorizes the payee, or some person taking the check, to make demand of payment (*Bk. of British N. Am. v. Merchants' National Bk.*, 91 N. Y. 106, 111), and the refusal to pay on presentation of the check, which presentation is equivalent to a demand of payment, gives to the drawer a right of action, in case he has funds in the bank to meet the check, and the refusal to pay was without his authority.

It appeared indisputably, and is substantially found by the trial court, that the two checks given by plaintiff to Banker and by him indorsed to Ellen M. Houghtaling, were presented to the bank, defendant, for payment, and payment refused, the one in March, 1869, the other in August, 1871. At the time of such refusal there was written upon one of the checks "Payment refused" and upon the other "no funds." It is to be presumed, at least so far as plaintiff is concerned, that the per-

son presenting the checks had the right so to do, and nothing is shown to the contrary; such being the case, the bank became liable when presentation was made for the amount of each check, and payment of the same was refused.

We think that a demand for the whole balance on deposit is not requisite in order to enable the depositor to maintain suit against the bank. The implied contract between a bank and its depositor is that it will pay the deposits when and in such sums as are demanded. Whenever a demand is made by presentation of a genuine check in the hands of a person entitled to receive its amount, for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises. For the balance no suit can be brought until demand is made. In other words, the depositor has the election to make the whole claim payable at one time by demanding the whole, or in installments by demanding portions thereof, and it would be a novel doctrine that when the claim has thus been made payable in installments, no action could be brought for an installment which has become due and payable, because there is a residue of the claim not due.

But again, the general rule above stated, *i. e.* that the holder of a check cannot maintain an action against the drawee, is not applicable to this case. The money deposited by plaintiff belonged to Banker, and the deposit in the bank was made by his direction. It matters not that the deposit was made to his, plaintiff's, individual account, and in an action brought by the principal against the bank, upon refusal to pay his agent's check, the bank cannot set up a want of privity. (*Van Alen v. Am. Nat. Bk.*, 52 N. Y. 1.)

Banker, to whom the money belonged, or any person to whom he had transferred his claim against the bank, could have maintained an action on presentation and refusal to pay the checks, and upon demand and refusal the statute began to run.

The claim made by the respondent's counsel, that if the action had been barred by the statute of limitations it was revived by the payment by the bank of the two checks of the plaintiff, one on December 2, 1872, of \$18.82, and the other

on March 27, 1873, of \$4.33, and that the defendant was thereby estopped from interposing the defense of the statute of limitations until six years after that, is not well founded. The amount of these two checks constituted the balance which was due to the plaintiff from the defendant for moneys deposited on his own account separate from the moneys belonging to Banker for which the checks in question in this action were drawn. As the depositor has a right to draw his check for separate portions of the money belonging to him on deposit and a cause of action arises upon presentation and refusal to pay such check, the payment of the checks drawn after those which are the subject of controversy in this action, could not affect the cause of action which arose upon their presentation to the bank and its refusal to pay. The payment of the two checks referred to did not authorize the conclusion that the defendant intended to recognize the fact that the other checks were still a subsisting indebtedness against which the statute had not commenced to run, but such payments were entirely separate and independent transactions, having no reference whatever to the checks in suit. Under the facts there is no ground for claiming that the payment of the checks of December 2, 1872, and March 27, 1873, was a recognition of any indebtedness beyond them, and operated as a revival of the debt and prevented the statute from running.

The respondent's counsel also claims that under subdivision 3, section 414, of the Code of Civil Procedure, a person entitled to commence an action when the Code took effect might commence such action before the expiration of two years after the Code should go into effect, and that as the Code went into effect May 1, 1877, he had until May 1, 1879, to bring his action before it would be barred by the statute of limitations. We do not understand such to be the rule under the provision cited, which declares that a person entitled under said section to bring an action when the Code took effect where he commences the same before the expiration of two years after the Code took effect his action is governed by the same law applicable thereto immediately before the Code went into effect. This provision of the Code only left actions brought within two years to be

Statement of case.

governed by the law applicable to the case at the time the Code went into effect, and in no way operated to extend the time for the application of the statute of limitations. It remains in force the same as before the enactment of the Code.

There are other questions in the case, but in view of the conclusions already arrived at, their examination is not necessary.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

EARL, DANFORTH and FINCH, JJ., on both grounds discussed in the opinion; ANDREWS, J., on first ground; RUGER, Ch. J., on second ground. RAPALLO, J., absent.

Judgment reversed.

JOHN A. O'REILLY, Respondent, v. THE CORPORATION OF THE LONDON ASSURANCE, Appellant.

J., an agent of defendant, was authorized by it to receive proposals for fire insurance, fix rates, receive moneys and countersign, issue and renew policies which were furnished him in blank, signed by defendant's manager, to be filled by him; he entered the insurance he effected in books kept by him, and made daily and monthly reports to defendant. J. issued a policy to C., which contained a clause providing that it might "be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy, or a receipt is given for the same." In an action wherein plaintiff, as assignor of C., claimed a renewal of the policy, his evidence was to the effect that about a month before the expiration of the policy, J. and C. had a conversation in reference to the insurance, in which C. told J. to renew the policy, and the latter stated he would renew it for another year; a loss occurred after the expiration of the original policy; no renewal receipt was ever executed; no renewal was indorsed on the policy or entry thereof made by J., or report thereof made by him to defendant; the premium was not paid, tendered or otherwise arranged, and no action or further conversation had between J. and C. in regard to the insurance until after the fire, although J. and C. were near neighbors. During six months after the fire, C. made no claim under the policy and gave no notice of his loss. *Held*, that the

Statement of case.

testimony failed to show, and did not justify a finding of a renewal of the policy.

(Argued March 1, 1886; decided March 16, 1886.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 23, 1884, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was upon an alleged agreement to renew a policy of fire insurance.

The material facts are stated in the opinion.

Louis Marshall for appellant. Jackson was not authorized by the defendant to make the alleged contract of renewal. (*Mersereau v. Phoenix M. L. Ins. Co.*, 66 N. Y. 278.) By the terms of the eleventh condition of the policy, Jackson, in any transactions that may have occurred between him and Craner with reference to the renewal of the policy annexed to the complaint, acted as the agent of Craner and not of the defendant, and he not having communicated the fact of such negotiations that may have occurred between him and Craner to the company, and the latter not having taken any action thereon, no contract of insurance was effected in favor of Craner. (*Sargent v. Nat. Ins. Co.*, 86 N. Y. 626; *Sower v. Com. Un. Ins. Co.*, decided recently in Supreme Court of Pennsylvania; *Rohrback v. Germania F. Ins. Co.*, 62 N. Y. 47; *Alexander v. Germania F. Ins. Co.*, 66 id. 464; *Van Schaick v. Niagara F. Ins. Co.*, 68 id. 434.) Whatever may have been Jackson's legal relation to the defendant, and whatever may have been his powers, there is not as matter of fact evidence of a contract to renew. (*Luby v. H. R. R. Co.*, 17 N. Y. 131; *Anderson v. R. W. & O. R. R. Co.*, 54 id. 344; *People, ex rel. Tenth Nat. Bk.*, v. *Green*, 5 T. & C. 379; *Dean v. Aetna L. Ins. Co.*, 62 N. Y. 643; *White v. Miller*, 71 id. 118; *Coulter v. Am. M. U. Ex. Co.*, 56 id. 585; *Nichols v. White*, 85 id. 531.) A contract to renew a policy of insurance is a contract to continue the insurance upon the terms and condi-

Opinion of the Court, per EARL, J.

tion of the original policy, and there can be no recovery for breach of such a contract, except upon showing compliance with the conditions precedent to a recovery upon the policy. (Wood on Fire Ins., § 131; *Hay v. Star Ins. Co.*, 77 N. Y. 235.) There cannot be a recovery in this action, because Craner failed to pay the premium of insurance, and failed to establish a waiver of such payment by the defendant. (Wood on Fire Ins., § 5; *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619; *Hambleton v. Home Ins. Co.*, 6 Bissell, 91.)

John B. Kline for respondent. Jackson was the agent of the defendant in the locality in which he acted, and had full authority to make the contract to renew the then existing policy. (*Trustees, etc., v. Brooklyn F. Ins. Co.*, 19 N. Y. 305, 311; *Ellis v. Albany City F. Ins. Co.*, 50 id. 402-409; *Angel v. Hartford F. Ins. Co.*, 59 id. 171; *Parker v. Arctic F. Ins. Co.*, 1 Sup. Ct. [T. & C.] 397; Wood on Fire Ins., § 11.) Jackson was the agent of defendant and not of Craner in making the contract of renewal. (*Partridge v. Commercial F. Ins. Co.*, 17 Hun, 95, 97.)

EARL, J. From 1876 until after the commencement of this action, one Amos Jackson was the agent of the defendant at Jordan in this State, under a written appointment by which his powers were limited and described as follows: "To receive proposals for insurance against loss and damage by fire in Jordan and vicinity, to fix rates of premiums, to receive moneys, and to countersign, issue, renew and consent to the transfer of policies signed by the managers for the United States for the London Assurance Corporation, subject to the rules and regulations of said company, and such instructions as might be given from time to time by its managers." He was furnished by the defendant with blank policies signed by its secretary, which he filled up when applications for insurance were made to him; he entered the insurances effected by him in books kept by him, made to the company daily and monthly reports of his transactions, and made monthly remittances of premi-

ums. On the 14th day of August, 1879, he issued a policy to one Nicholas Craner upon a building owned by him in the village of Jordan, insuring him against loss by fire to the amount of \$1,500 for one year from that date. The policy contained the following provisions: "This insurance (the risk not being changed) may be continued for such farther time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy, or a receipt given for the same, and it shall be considered under the original representation and for the original amounts and divisions unless otherwise specified in writing." "This corporation shall not be liable by virtue of this policy or any renewal thereof unless the premium therefor shall be actually paid." In July, 1880, about four weeks before the expiration of the policy, Jackson went to Craner and had the following conversation with him as detailed by Craner in his evidence: "He came in and said I had better put another thousand dollars upon the building. He wanted to know if I was not ready. I said I would run a little risk myself, but I thought that I would not then. Then he spoke about the other, and said it would not be but \$15 the next year, and that was low. I told him I thought it was very reasonable, but that I would run some risk myself. I don't know whether he said when it expired. He said he wanted to put on another thousand. He did some little trading, I guess, with me at the time. He didn't say any more then; that is all the conversation I remember at the time. Q. Did you state to him that you would pay the premium? A. Nothing was said about it; I told him to renew the policy—it was \$1,500, and he wanted a thousand more. I understood him to say he would renew it." Craner's son testified that he heard the same conversation, and he stated it as follows: "Jackson wanted to put on a thousand dollars more; father said he thought he would run some risk himself; Jackson thought it would be but one percent now, or \$15 for \$1,500; father said he knew it was low, but that he would carry but \$1,500; Jackson said he was a good customer of father's and would like some of his insurance business; father said he would carry that, and Jackson said all

right, he would renew it for another year; my father told him at the store all right, to keep it in force; that was at the store in 1880; Jackson said he would." Jackson, called as a witness for the plaintiff, gave a different version of the conversation, and substantially denied that he agreed to renew the policy. The property insured was destroyed by fire on the 2d of February, 1881, about seven months after this conversation; and in the meantime, although Craner and Jackson were near neighbors and met almost daily, they had no conversation whatever about the insurance or the renewal of the policy, and the subject was never mentioned between them. No renewal receipt was ever executed or given by Jackson to Craner, and the renewal was not indorsed on the policy, and no entry of the renewal was ever made on any paper or in any book by Jackson. The premium was not paid or tendered or otherwise arranged, and no report of the renewal was made to the defendant, and no action whatever was taken by either party in reference thereto previous to the fire. By the same fire which destroyed Craner's building, Jackson lost a building which was insured by the defendant, and he was present at the fire, and upon informing the defendant of his loss congratulated it and himself for not having any risk upon Craner's property; and upon being spoken to by Craner the next day after the fire, he stated to him that he was not insured; and during six months thereafter Craner made no claim upon his policy and gave no notice of his loss. In January, 1882, he transferred his claim against the defendant to the plaintiff, who paid \$1 therefor, and in addition thereto agreed to give him one-half of what he should recover of the defendant.

Upon these facts we think it cannot be held that Craner had a valid insurance or a valid contract for insurance upon his property. There was no present renewal of his policy, and, considering the terms of the policy and all the circumstances, we think Craner and Jackson could not have supposed or understood that a binding contract for the renewal had been made. The premium was not paid or arranged in any way, and it was not agreed that credit should be given therefor. There was

Statement of case.

nothing but the casual conversation detailed by the two witnesses which took place four weeks before the renewal would be needed. Further action must have been contemplated by the parties to the transaction. Craner should have paid or tendered the premium and asked for the renewal. It cannot be held that payment of the premium was waived, as the defendant knew nothing about the alleged renewal, and Jackson either did not understand that there was any renewal, or had forgotten the conversation he had had with Craner.

In order to uphold and enforce this insurance, we would have to go further than any decision of this court has yet gone, and lay down an impolitic rule which would make the business of insurance, transacted through agents all over the country, far away from their principal, altogether too hazardous and uncertain.

Therefore, without noticing other points argued on behalf of the appellant, we are of opinion that the judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except DANFORTH, J., not voting.

Judgment reversed.

In the Matter of the Application of ADELIA L. OTIS, Executrix,
etc., et al.

After Inquisition found and the appointment of a committee of the estate of a lunatic, the court has jurisdiction to direct the application of the estate to the payment of demands existing against it, and this relief may be granted on petition of a claimant.

Where the estate is insufficient to pay the debts, the assets, personal as well as real, must be distributed ratably among all the creditors; the petitioning creditor is not entitled to a preference.

A claim for rent under a lease to the lunatic, whether accruing before or after the appointment of a committee, has no intrinsic preference over his other debts, and in the absence of some special equity growing out of the circumstances of the particular case, the landlord comes in simply as a general creditor for the rent unpaid.

It seems that if the leased premises are occupied by the committee and such occupation is to the advantage of the estate, as when it is necessary

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110	347
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114	16
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128	310
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Statement of case.

to carry on or close up the business of the lunatic, the rent accruing during such occupation will be regarded as a reasonable expense incurred by the committee to be paid before the claims of other creditors.

As, however, the committee takes no title to the estate, he being a mere bailiff to take charge of it, such occupation by him for a time does not make him liable as assignee for the term, it creates no privity of estate between him and the lessor.

The distinction between such a case and that of a receiver or assignee in bankruptcy pointed out.

Where, therefore, the committee of the estate of a lunatic continued to carry on his business, occupying for that purpose premises held by him under a lease for a term of years, and thereafter the committee resigned and a new one was appointed who closed up the business, and upon petition of the landlord that said committee be required to pay rent subsequently accruing, it appeared that the committee had not occupied the premises during any portion of the quarter for which rent was claimed, also that the estate was insolvent, *held*, that the prayer of the petition was properly denied; that he was not entitled to a preference, but simply to come in and share with the other creditors.

(Argued March 2, 1886; decided March 16, 1886.)

APPEAL from order of the General Term of the Supreme court, in the first judicial department, made January 13, 1886, which reversed an order of Special Term, directing Eustace Conway as committee of the estate of Oscar Strasburger, a lunatic, to pay rent accruing under a lease to the lunatic of certain premises in the city of New York. The order appealed from also denied the prayer of the petitioners, the lessors. (Reported below, 38 Hun, 597.)

On September 17, 1884, said Strasburger was adjudged a lunatic, and a committee of his estate appointed; he was, prior to that, engaged in business in New York city, occupying for that purpose premises leased to him by the petitioners for a term of years, for an annual rent payable in quarterly installments. The committee so appointed continued the business; said committee resigned and Mr. Conway was appointed; he did not continue the business and never occupied or used the premises. The petition prayed that he be required to pay the quarter's rent falling due under the lease May 1, 1885. It appeared that the estate was utterly insolvent.

Statement of case.

John L. Cadwalader for appellants. Where an assignee, a receiver or a committee takes deliberate possession of demised premises and uses them for the estate, he becomes in equity an assignee of the lease. (Taylor on Landl. & Ten., §§ 437-444; *Martin v. Black*, 9 Paige, 644; *Young v. Peyser*, 3 Bosw. 308; *Astor v. Lent*, 6 id. 612; *Morton v. Pinkney*, 8 id. 135, 139-40; *Jones v. Hausmann*, 10 id. 168; *In re Catherine Wolfe*, Sup. Ct., Sp. Term, Sept. 17, 1878, MSS., per DANIELS, J.; *People v. Nat. Trust Co.*, 82 N. Y. 283; *Woodruff v. E. R. Co.*, 93 id. 609, 624; *People v. Un. L. Ins. Co.*, 30 Hun, 142; *In the Matter of Otis*, 34 id. 42; *Moore v. Higgins*, 20 Weekly Dig. 123.) An assignee who has deliberately assumed a lease cannot rid himself of it by a notice or by expressing a wish to avoid further liability. (Taylor on Landl. & Ten. [5th ed.], §§ 444, 461; *People v. Nat. Trust Co.*, 82 N. Y. 283.) The term "assignee" is very comprehensive, and extends to all persons taking the estate in the lease, either by act of the party or by operation of law. (2 Platt on Leases, 419; *Hannon v. Stevenson*, 2 B. & Ald. 303; *People v. Nat. Trust Co.*, 82 N. Y. 283; *Woodruff v. Erie R. Co.*, 93 id. 624; *People v. Nat. Trust Co.*, 82 id. 283.) If the estate once becomes vested, nothing short of a deed of conveyance or an assignment of the lease will discharge the assignee from liability. (2 Platt on Leases, 449; Taylor on Landl. & Ten., § 452; *Lewis v. Burr*, 8 Bosw. 148; *Tate v. McCormick*, 23 Hun, 218.) The committee is in possession by his sub-tenants. The possession of the sub-tenant is his possession. (Taylor on Landl. & Ten. [7th ed.], §§ 444, 461; *Carter v. Hanmett*, 18 Barb. 608; *Moore v. Higgins*, 20 Weekly Dig. 123.) It is not material from what source the fund in the committee's hands has come; he must discharge this liability from any funds that he may have in his hands. (*Moore v. Higgins*, 20 Weekly Dig. 123; *Woodruff v. Erie R. Co.*, 93 N. Y. 623.) The petitioners are entitled to recover their rent by a summary order, such as was made at Special Term. (*People v. Nat. Trust Co.*, 82 N. Y. 283; *People v. Un. L. Ins. Co.*, 30 Hun, 142; *Woodruff v.*

Opinion of the Court, per ANDREWS, J.

Erie R. Co., 93 N. Y. 619-20; *In the Matter of Otis*, 34 Hun, 542.)

Francis Lynde Stetson for respondent. By accepting appointment as temporary committee, Mr. Conway did not become chargeable with the payment of rent to the petitioners, except in due course of administration of the lunatic's estate which was insolvent. (*People v. Nat. Trust Co.*, 82 N. Y. 283-287; *Martin v. Black*, 9 Paige, 641; 34 Hun, 542; *Howard v. Heinerschitt*, 16 id. 177.) A receiver, and consequently a committee, has a right to waive a term under a lease. (*Martin v. Black*, 9 Paige, 641; *Woodruff v. Erie R. Co.*, 93 N. Y. 609-624.) The committee cannot become by operation of law or equity the assignee of a lease which had been made to the lunatic. (*Copeland v. Stephens*, 1 Barn. & Ald. 594; *Ferrin v. Myrick*, 41 N. Y. 319; *Drury v. Fitch*, Hutton, 16.)

ANDREWS, J. The jurisdiction confided to the court over the persons and estates of lunatics, carries with it as a necessary incident, after inquisition found and the appointment of a committee, the power to direct the application of the estate of the lunatic to the payment of demands existing against it, and this relief may be granted on the petition of the claimant. (*Exrs. of Brasher v. Van Cortland*, 2 Johns Ch. 244; *In re Heller*, 3 Paige, 199, 200; *People v. Nat. Trust Co.*, 82 N. Y. 283.) This jurisdiction in its origin was equitable, and is exercised upon equitable principles, and in accordance with the maxim that "equality is equity." This equitable rule has been embodied in the statute in respect to the distribution of money arising from the sale of the land of the lunatic, for the payment of debts, which declares that the proceeds shall be distributed ratably among all the creditors. (2 Rev. Stat. 54, § 15; Code of Civ. Pro., § 2364.) There is no express statutory provision regulating the mode of distribution of the personal assets, but it cannot be doubted that when the assets are insufficient to pay all the debts in full, the same rule of equality

should be applied. In view of this principle the relief sought by the petitioner was properly denied.

The lunacy of Strasburger did not discharge or affect his covenants in the lease. The rent accruing after the appointment of the committee became a charge upon his estate, and was a demand which the petitioners could present and have adjusted in the ordinary course of administration. A claim for rent under a lease, whether accruing before or after the appointment of a committee, has no intrinsic preference over other debts of the lunatic. The lessor has his remedy by re-entry in case of default in payment of the rent, or he may forego his right to terminate the term, and come in as a general creditor of the estate for the rent unpaid. There may be equitable reasons upon which the court in a particular case ought to give a preference for rent accruing after the appointment of the committee. If the leased premises are occupied by the committee, and such occupation is to the advantage of the estate, as where it was necessary in order to carry on or close up the business of the lunatic, the rent accruing during such occupation would justly be regarded as a reasonable expense incurred by the committee to be paid before the claims of general creditors. But we perceive no equitable principle upon which a demand for rent takes preference of other debts, in the absence of a special equity growing out of the circumstances of a particular case. It is claimed that the occupation of the premises for a time by the first committee was an acceptance of the lease by him, and that he thereby became liable as assignee of the term, and that the present committee succeeded to his situation and responsibility. If this claim was well founded, it would be material only as bearing upon the general equity of the committee, to be protected against liability, by charging the fund in his hands with the rent before paying the general creditors. But we are referred to no authority which sustains the proposition that the committee of a lunatic becomes chargeable as assignee of a lease held by the lunatic, by reason of his occupation of the premises after his appointment.

Opinion of the Court, per ANDREWS, J.

It is well settled that a receiver, or an assignee in bankruptcy, or an assignee for the benefit of creditors, if he elects to accept a lease belonging to the debtor, or assignor, becomes by such election assignee of the lease and personally liable on the covenant to pay rent, of which liability he can only discharge himself by an assignment or surrender. (*Copeland v. Stephens*, 1 Barn. & Ald. 594; *Thomas v. Pemberton*, 7 Taunt. 206; *Clark v. Hume*, 1 Ryan & M. 207; *Carter v. Warne*, 4 Carr. & P. 191; *Martin v. Black*, 9 Paige, 641; *Journeay v. Brackley*, 1 Hilt. 447; *Lewis v. Burr*, 8 Bosw. 140.) This doctrine proceeds on the ground that on the election being made, the receiver or assignee becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver or assignee, by virtue of which the latter becomes liable on the covenants running with the land. But the committee of a lunatic takes no title to the real or personal estate of a lunatic. He is a mere bailiff to take charge of the property of the lunatic, and to administer it subject to the direction of the court. His possession is the possession of the court. (*In re Heller*, *supra*; *Nos v. Gibson*, 7 Paige, 513; *Petrie v. Shoemaker*, 24 Wend. 84, 85; *Lane v. Schermerhorn*, 1 Hill, 97.) It follows as a necessary consequence from the nature of his office and the fact that the title to the lunatic's property is not divested by the appointment of the committee, that the occupation by the latter under a lease to the lunatic, is in the character of servant, agent or bailiff, and creates no privity of estate between him and the lessor. The facts in this case did not call upon the court to intervene for the protection of the committee, nor do they furnish any ground for equitable preference of the claim of the petitioner. The lunatic's estate is largely insolvent; the committee has not, in fact, occupied the premises during any portion of the quarter for which rent is claimed; the petitioner was notified by the present committee on his appointment, that he would not occupy the premises; the continuance of the lease was a disadvantage to the estate, and the remedy of the petitioner to oust the sub-tenant and to regain possession of the

Statement of case.

premises, was complete. The lessor has a claim against the lunatic's estate, upon which he can come in with the other creditors. It would be inequitable, under the circumstances, to give him a preference.

The order of the General Term should be affirmed.

All concur.

Order affirmed.

GEORGE C. PRESTON, Respondent, v. SAMUEL R. HAWLEY, Appellant.

To maintain an action for use and occupation of real property, it is not only necessary for plaintiff to prove title, but that the conventional relation of landlord and tenant existed between the parties.

While it is not essential to show that this relation was created by written instrument or express agreement, there must be proof of some circumstances authorizing an inference that the parties intended to assume that relationship toward each other.

A vendor of real estate who remains in possession of part of the property after the conveyance does not thereby become tenant to the purchaser, and is not liable for use and occupation.

It seems the remedy of the purchaser, if the vendor refuses to surrender the possession, is by action of ejectment alone, in which he may recover damages by way of mesne profits for the unlawful withholding of possession.

In an action for use and occupation it appeared that plaintiff purchased of defendant the premises in question, consisting of a hat factory and machinery therein. After the conveyance defendant allowed certain stock used in the business, which was on the premises at the time of the sale, to remain there for about two months after the conveyance. Plaintiff demanded rent, but this defendant refused to pay, offering to pay for storage; this was about a month before he removed the stock. *Held*, that the evidence failed to show the existence of the relation of landlord and tenant; and that the action was not maintainable.

(Argued March 3, 1886; decided March 23, 1886.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order

Statement of case.

made May 30, 1884, which affirmed a judgment in favor of plaintiff.

This action was for use and occupation.

The material facts are stated in the opinion.

George Wilcox for appellant. This action being for use and occupation cannot be maintained unless the relation of landlord and tenant existed between the plaintiff and defendant. (*Thompson v. Power*, 60 Barb. 463, 477; *Sylvester v. Rawlston*, 31 id. 286; *Hall v. Southmayd*, 15 id. 36.) This relation cannot exist except by mutual agreement. (*Benjamin v. Benjamin*, 5 N. Y. 388; Woodf. Landl. & Ten. [11th ed.] 510; Tayl. Landl. & Ten. [7th ed.] 636; Dart on Vend. & Purch. 816; *Boston v. Binney*, 11 Pick. 1-9; *Greenup v. Vernon*, 16 Ill. 26; *Tew v. Jones*, 13 M. & W. 12.) A vendee who enters into possession after contract to purchase, which contract fails for any reason whatever — even his own fault — is not liable to an action for use and occupation. (*Smith v. Stewart*, 6 Johns. 46; *Bancroft v. Wardwell*, 13 id. 489; *Thompson v. Bower*, 60 Barb. 463; *Sylvester v. Rawlston*, 30 id. 286; *Hall v. Southmayd*, 15 id. 36.)

Charles M. Preston for respondent. The relation of landlord and tenant existed between the parties, and the action for use and occupation was well brought. (McAdam on Landl. & Ten., § 30; *Pierce v. Pierce*, 25 Barb. 243; *Thomas v. Nelson*, 69 N. Y. 118; *Reeder v. Sayer*, 70 id. 180; Abb. Tr. Ev. 351; *Despard v. Walbridge*, 15 N. Y. 374; *Coit v. Planer*, 7 Rob. 413.) The defendant by remaining on the premises after the notice that plaintiff regarded him as his tenant, and by his silence, ratified the understanding of plaintiff that defendant was there as tenant. (*Despard v. Walbridge*, 15 N. Y. 374; *Mark v. Burt*, 5 Hun, 28.) It is not necessary that defendant should have actually used the premises and property. If he had the right and power to do so plaintiff may recover. (34 N. Y. 284.) The action was properly brought and recovery had against defendant individually. (*People v. Univ. L. Ins.*

Opinion of the Court, per RUGER, Ch. J.

Co., 30 Hun, 142; *Ferrin v. Meyrick*, 41 N. Y. 315; *Austin v. Munroe*, 47 id. 360; *Seaman v. Whitehead*, 78 id. 306; *New v. Nichol*, 12 Hun, 431; *Rogers v. Wheeler*, 43 N. Y. 598.)

RUGER, Ch. J. The plaintiff sought to recover in this action, for the use and occupation by the defendant, of certain real property belonging to the plaintiff. It is not disputed by the respondent, but that it was not only necessary, to prove the title of the premises in the plaintiff, and the occupancy thereof by the defendant, but that the conventional relation of landlord and tenant existed between the parties, in order to maintain the action. (*Thompson v. Bower*, 60 Barb. 463, 476; *Sylvester v. Ralston*, 31 id. 286; *Hall v. Southmayd*, 15 id. 32, 36.) This is the uniform doctrine of the cases, and elementary writers, and has been indisputable law since the enactment of the statute authorizing this form of action. It is not, however, essential that the relation should be created by written instrument or express agreement, but there must be proof of some circumstances authorizing an inference that the parties intended to assume such relations toward each other, to support the action. (*Benjamin v. Benjamin*, 5 N. Y. 383, 388; authorities *supra*.)

No direct evidence was given by the plaintiff tending to prove such relations, but they were attempted to be shown by circumstances, which, it was claimed, would justify the inference that the occupation in question was enjoyed by the defendant under the expectation on his part, of paying rent therefor.

We are of the opinion that there is no proof in the case from which the court were authorized to draw such an inference. The evidence was very brief and was substantially to the effect, that prior to June 7, 1883, the defendant took title to the premises in question, consisting of a large hat factory and machinery necessary to carry on the business of making hats contained therein, as the general assignee for the benefit of creditors of one Babcock, and on that day sold at public auction said premises to the plaintiff, and on June twenty-first thereafter conveyed them by deed to him. There was no proof

of any use of the premises or machinery by the defendant, for the purposes of manufacturing, or of any occupation by him, except such as might be implied from his omission to remove certain stock, belonging to him as assignee, and intended to be used in the business of making hats, which was on the premises at the time of the sale. There was no evidence as to the quantity of this stock, or of the extent of the room necessary to afford it storage, but it was proved to have remained on the premises for two months after the date of the deed.

In answer to the question whether there was "any conversation between you and defendant in reference to the use of the premises," the plaintiff testified, "nothing about time, we talked about it; I took my deed from him, and he was in possession and remained so. This deed says nothing about his staying in possession." Subsequently, in answer to the questions, "Did you demand rent; what conversation did you have?" plaintiff replied: "I wrote him to send me a check; he did not reply; I drew upon him and he did not honor the draft; and then when I saw him he told me that he thought the rent was excessive; that he should pay for storage but not for the regular full rent of the factory." "He continued to occupy after that perhaps in the neighborhood of a month." The plaintiff also testified that the rental value of the property was \$1,050 a month.

Upon this evidence the defendant requested the court to direct the jury to find a verdict for him, which was refused by the court, and the refusal was excepted to by the defendant. The court thereupon dismissed the jury, holding that there was no question of fact for them, and after considering the case, found that the defendant was liable for the rent claimed. The defendant duly excepted to the conclusions of fact as well as law made by the court, and thereby presents the question whether upon the undisputed evidence he was liable for the use and occupation of the premises.

We think the exceptions to these rulings and findings were well taken. The evidence shows affirmatively that the vendor did not remain in possession of the premises by virtue of

Opinion of the Court, per RUGER, Ch. J.

any express agreement to rent them, and none can be inferred from the fact that some of his property remained therein after the sale. The vendee under his deed was entitled to the immediate possession of the property, and could recover such possession if it was denied him, by ejectment alone. In such action the vendor would be liable to respond in damages by way of mesne profits, for his unlawful conduct in refusing possession, but would not be liable in an action for use and occupation. It is said in Woodfall's Landlord and Tenant (10th ed., 714), that "a vendor who remains in possession of part of the property after the execution of the conveyance does not thereby become tenant to the purchaser nor liable to him in an action for use and occupation," citing *Tew v. Jones* (13 M. & W. 12), and this is uniformly the language of the text-writers. (See Taylor's Landl. & Ten. [5th ed.], § 636; Dart on Vend. & Purch. 816; *Boston v. Binney*, 11 Pick. 1; *Greenup v. Vernon*, 16 Ill. 26.)

It follows from this principle that the subsequent possession of the vendor, would continue to be of the same character as that which attended its inception, unless changed by some contract entered into during its continuance.

It is claimed that the conversation occurring between the plaintiff and defendant after the sale had this effect. We do not assent to the construction put upon the conduct and conversations of the parties by the court below. It is quite essential to implied, as well as express contracts, that there should be some act performed, or language used, by both parties, from which the conclusion can be fairly drawn, that their minds met, upon the conditions of the agreement. Most certainly if one party expressly declines to assent to the proposed terms, no inference can be indulged that he has assented.

The evidence shows a steady refusal on the part of the defendant to become obligated to pay rent for the premises in question. He expressed his willingness to pay something for storage, but denied his liability for the use and occupation of the premises as a factory. There was manifest justice in his position, for it does not appear that he had any such use of the

Statement of case.

premises as ought justly to subject him to the payment of rent therefor. If the plaintiff was unwilling to allow the defendant's property to remain stored upon the premises, he should have demanded its removal, or insisted upon some definite agreement as to the rate of compensation to be paid. He cannot change the relation existing between himself as a purchaser of real property, and the vendor unlawfully remaining in possession at his option, and impose upon such vendor the character of a tenant, by stating to him that he should thereafter require him to pay rent. It requires the assent of both parties, manifested in some intelligible manner, to make such a contract, and it is not like the case of a tenant continuing in possession after the expiration of his term under an announcement by the landlord of a change in the lease. There the assent of the tenant is implied, from his voluntary continuance of the term after a change in the conditions are stated, and the further occupation by the tenant is rightfully presumed to be under the lease as thus modified by the landlord.

In this case there were never any contract relations between the parties except those stated in the deed, and no evidence showing authority in the plaintiff to impose terms upon his vendor, or of assent by him to hold as tenant under his vendee.

The judgment of the General and Special Terms should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

HENRY S. CARPENTER et al., Respondents, v. ELMORE A. KENT
et al., Appellants.

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Where, after a settlement and adjustment of an account between the parties a mistake as to one item thereof is discovered, and an action is brought to correct the mistake, this does not give to the defendant a right to have the whole account opened; the mistake may be corrected and the right of the parties readjusted in regard thereto, but in other respects defendant

Statement of case.

is bound by the account, actually settled, unless he can show some mistake or fraud in the settlement in respect to other items.

(Argued March 4, 1886 ; decided March 23, 1886.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, in favor of plaintiffs, entered upon an order made June 16, 1884, which overruled defendants' exceptions and directed judgment on a verdict. (Reported below, 18 J. & S. 371.)

This action was brought to recover back money alleged to have been paid and allowed by mistake on an adjustment of accounts between the parties.

The material facts are stated in the opinion.

Robert L. Wensley for appellants. The final payment made by the plaintiffs was not made upon an account stated but was an accord and satisfaction. (*Lockwood v. Thorne*, 18 N. Y. 288 ; *Stenton v. Jerome*, 54 id. 484 ; *Pierce v. Pierce*, 25 Barb. 252 ; *Neary v. Bostwick*, 2 Hilt. 519.) Mutual compromises having been made upon the settlement of the account it cannot be opened ; nor can any evidence be given to impeach it. (*Lockwood v. Thorne*, 18 N. Y. 492 ; *Palmerston v. Huxford*, 4 Den. 166 ; *Farmers' Bk. v. Blair*, 44 N. Y. 652.)

A. B. Tappen for respondents. Accounts once settled between parties after full examination will not be opened by the court unless fraud be alleged and satisfactorily proven ; but either party has a remedy for any manifest error or mistake which was not the subject of dispute or of settlement. (Wait's Act. & Def. 196, 198 ; *McIntyre v. Warren*, 3 Abb. Ct. of App. Dec. 99 ; *Wilde v. Jenkins*, 4 Paige, 481.) An action will lie to correct the mistake and collect the money, and if defendants in charging a draft to plaintiffs had undercharged the amount, they would have a like remedy to collect the difference. (6 Wait's Act. & Def. 427 ; *McDougal v. Cooper*, 31 N. Y. 498 ; *Stenton v. Jerome*, 54 id. 480.) A mutual mistake of fact will authorize the court to correct an account in that respect. (*Calkins v. Griswold*, 11 Hun, 208.) The account

Opinion of the Court, per EARL, J.

cannot be opened as to items disputed and adjusted, unless among other things the defendants refund the sum which they induced the plaintiffs to pay in settlement of the dispute. (*McMichael v. Kilmer*, 76 N. Y. 16.)

EARL, J. In the months of November and December, 1882, the defendants were commission merchants in the city of New York, and received from the plaintiffs, who were grain dealers in Chicago, consignments of grain for sale on their account, and honored their drafts against such consignments; and in those months these transactions amounted to upward of \$60,000. In the last month, the defendants rendered their account to the plaintiffs, showing a balance due against them of \$1,986.62. There was included in this account, as rendered, a charge against the plaintiffs for \$1,550, as the amount of a draft paid, which charge is conceded to have been erroneous, but the error was unknown to both parties. The plaintiffs disputed the account in other respects, and, after considerable correspondence between the parties, offered to pay one-half of the balance claimed by the defendants, if they would accept it in full settlement. The defendants accepted the offer, and agreed to the settlement, and the plaintiffs paid \$993.31, one-half of the balance, and received from the defendants a receipt therefor, which was stated to be in full for all demands to date. Thereafter the plaintiffs discovered the erroneous charge of \$1,550, and demanded payment thereof from the defendants, who admitted the error, and offered to pay the plaintiffs the difference between \$1,550, and \$993.31, the amount relinquished by them in the settlement, with interest, and to go over the items and make a new settlement of the account. The plaintiffs refused the offer and brought this action to recover the \$1,550 and interest.

There is no claim on the part of the defendants that there was any other mistake, upon the settlement between the parties, in reference to any other items of the account. There was a dispute as to two or three items, and those disputes were settled to the satisfaction of the parties. There never was any

Opinion of the Court, per EARL, J.

dispute as to the \$1,550. That amount the defendants owed to the plaintiffs on account of the grain which they had sold for them. We do not think that the defendants had the right to have the whole account opened, but that they were bound by the account actually settled, unless they could show some mistake or fraud in the settlement. (*Bruen v. Hone*, 2 Barb. 586.) Where an account has thus been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake can be corrected and the rights of the parties readjusted as to such mistake. Here, leaving everything to stand just as the parties actually adjusted and settled the items of the account, there still remains due to the plaintiffs the sum which they claim in this action, and that sum they were entitled to recover without opening the account.

One of the defendants testified upon the trial that he did not know of the mistake at the time of the compromise; and he was then asked this question: "Had you known of the mistake would you have made the agreement you did make?" This question was objected to and excluded, and the defendants complain of this exclusion as error. As the mistaken item had nothing whatever to do with the settlement, it is not perceived how this question could have been truthfully answered in the negative, nor how any answer given could have been material. It was not an offer to show that the defendants were in any way influenced or induced by the mistake to make the settlement, and we think the question was incompetent.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

THE NATIONAL CITY BANK, Appellant, v. THE NEW YORK GOLD EXCHANGE BANK, Respondent.

Defendant had a department for the general clearance of contracts between its customers for the purchase and sale of gold, known as the "Clearing-House." Clearances were made each day by means of statements furnished by the dealers to defendant, of purchases and sales made by them; defendant acting simply as mutual agent for the parties. On a day when many members of the clearing-house had failed to perform their contracts, and when there was great confusion in regard to them, O. & Co., plaintiff's assignor, presented two separate statements, one in the morning, and one in the afternoon. In the first was an item of a transaction between O. & Co., and a firm which failed on the morning of that day. It was not usual to present more than one statement during the same day. When O. & Co. called upon defendant for the balances shown to be due that firm by the statements, they were advised by its president, that owing to the confusion in business, he could not tell how the statements stood, and that the bank would only pay approximate balances, reserving a margin to secure defendant against failures. Defendant accordingly paid \$30,000 on the second statement, leaving \$10,000 unpaid thereon, and paid nothing on the first. In an action to recover the balances shown by the statements, *held*, that to entitle plaintiff to recover, it was necessary for it to show a clearance, by defendant, of the statements, and that a balance had been struck in favor of O. & Co., which made out a demand in the nature of an account stated; that the statements were to be taken and considered together as but one statement; but that if considered separately, there was no such clearance of either as bound defendant, and that plaintiff was not entitled to recover.

The only portion of the statement which was questioned was the item of the transaction with the insolvent firm; plaintiff claimed defendant was liable because of an omission on its part to notify O. & Co. of the failure; it appeared that O. & Co. had knowledge of the fact. *Held*, that, having such knowledge, the fact that they were not notified thereof by defendant was immaterial.

(Argued February 11, 1886; decided March 16, 1886.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 9, 1884, which affirmed, so far as appealed from by defendant, a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover balances alleged to be due

Statement of case.

upon two statements of gold transactions, the nature of which, as well as the material facts are set forth in the opinion.

William H. Arnoux for appellant. The effect of an account stated is the same as a promissory note. There is an existing legal obligation to pay the amount so ascertained to be due. (*Lockwood v. Thorne*, 11 N. Y. 170, 173; *Willes v. Jernegan*, 2 Atk. 257; *Phillips v. Belden*, 2 Edw. Ch. 1.) The plaintiff is entitled to recover on the first statement as an account. (*Oddie v. Nat. City Bk. N. Y.*, 45 N. Y. 735; *Shapley v. Abbott*, 42 id. 447; *Kellogg v. Ames*, 41 id. 264; *Plumb v. Cattaraugus Ins. Co.*, 18 id. 392; *Ames v. N. Y. W. Ins. Co.*, 14 id. 253; *Rowley v. Empire Ins. Co.*, 3 Keyes, 360; *Fowler v. N. Y. Gold Ex. Bk.*, 67 N. Y. 138, 143.)

Luke A. Lockwood for respondent. The relation subsisting between Oddie & Co. and the defendant was that of principal and agent. (*Fowler v. Gold Ex. Bk.*, 67 N. Y. 138.) The relation between a bank and its depositors is that of debtor and creditor. (*Matter of Franklin Bk.*, 1 Paige, 249; *Cragie v. Hadley*, 99 N. Y. 131, 133; *Met. Nat. Bk. v. Lloyd*, 90 id. 530, 536; *Comm. Bk. v. Hughes*, 17 Wend. 94; *Marsh v. Oneida Bk.*, 34 Barb. 298.) No action lies against the defendant as upon "an account stated." (*Volkening v. DeGraaf*, 81 N. Y. 268; *Stenton v. Jerome*, 54 id. 480, 484.) The relation of principal and agent existing between defendant and Oddie & Co., the only action which could be maintained by the plaintiff upon the facts proved is an action for an accounting. (Code of Civ. Pro., § 541.) There could be no action for negligence, because negligence is such a neglect of duty as causes damage. (*Nicholson v. E. R. Co.*, 41 N. Y. 525; *Barry v. N. Y. C. & H. R. R. Co.*, 92 id. 293; Story on Agency, 222, 236; Paley on Agency, 8, note 3; id. 39; *Bridge v. Mason*, 45 Barb. 37; *Blot v. Boiceau*, 3 N. Y. 78; *Allen v. Suydam*, 20 Wend. 321; *Buckingham v. Payne*, 36 Barb. 81; *Fowler v. Gold Ex. Bk.*, 6 Hun, 191.)

MILLER, J. The defendant, being a banking corporation, had a department for the general clearance of contracts for the purchase and sale of gold, known as the "clearing-house." These clearances were made among those who dealt with the defendant, and were members of the clearing-house, each day by means of statements of purchases and sales of gold made by them being delivered to the defendant. The defendant in these transactions acted as the common agent of the dealers in gold in the settlement of the contracts made between them. It received the gold sold from the seller, as his agent, and delivered it to the buyer for whom it was received, in the same capacity, and received from him the amount of the price thereof in currency and paid the same over to the party entitled thereto. This was accomplished by means of the statements delivered to defendant by the members dealing with it, the defendant from these statements determining the balance due it or the members on each day's transactions, and paying over to or receiving from the members such balance. The transaction in which the defendant was engaged was the mere exchange of commodities between those who were dealing with it, the defendant acting as mutual agent. Oddie & Co., plaintiff's assignors, were the principals, and the defendant was their agent to ascertain and determine the balance existing between them and the parties with whom they contracted, and upon said balance being ascertained and adjusted, defendant received it and transferred it to the party to whom it belonged. The defendant merely determined the balance due between contracting parties, and as their mutual agent delivered the gold or currency found due, upon receipt thereof, in settlement of their statements. (*Fowler v. N. Y. Gold Exchange Bank*, 67 N. Y. 138.)

To entitle the plaintiff to maintain this action it was necessary for it to establish that there had been a clearance of the statements under which a recovery was claimed, and that a balance had been struck in favor of Oddie & Co., which made out a demand in the nature of an account stated and thus created a liability against the defendant. It is claimed that

Oddie & Co., having presented to defendant, on the 24th of September, 1869, two separate and distinct statements, both of which were cleared, the plaintiff is entitled to recover a balance of \$7,282.50, currency, alleged to be due Oddie & Co., on the first statement, and \$10,000 gold, on the second statement.

The referee upon the trial held that there was no clearance by the defendant as to the first statement and that there was as to the second, and it appears from his opinion he decided that the non-clearance of the first statement was owing to the default of Belden & Co., one of the contractors mentioned in said statement, in not filing their statement with defendant, and as to the second it not being treated as a part of the first, was treated as an independent statement of other dealers, and not being open to the same objection as the first, was cleared, and the defendant thus became the holder of \$40,000 gold belonging to Oddie & Co., for which they could draw at once, and that the defendant recognized this by paying \$30,000 on account, which was indorsed on the statement, leaving a balance of \$10,000 gold due Oddie & Co.

It would seem that the statements of Oddie & Co. were cleared with the exception of the item therein stated as that of Belden & Co., and that no controversy exists as to any other item of the statements. Belden & Co. failed on the morning of the day when these transactions occurred. We think the referee was right in holding that the first statement was not cleared, and erred in his conclusion that the second statement was cleared. The first statement related to transactions of the day before and early in the morning of the twenty-fourth, and the second statement was of transactions late in the day of the twenty-fourth. The two statements must be taken together as constituting the transactions of the clearing-house with Oddie & Co. on the twenty-fourth of September. It was not usual in the transaction of the business in the clearing-house to present two statements during the same day, and we are unable to see why the presentation of more than one should change the character of the transaction for the entire day. In fact Oddie & Co. presented on this day several corrected statements after

the first two had been handed in, and it would seem as if all of these should be considered in connection as constituting a statement of the whole of their business with the defendant on the day named. It is very manifest that the failure of Belden & Co. was a sufficient ground for not clearing the first statement, if that statement can be regarded as separate and distinct from the other, and even if such was the case, as the failure of Belden & Co. would affect the entire account and thus render it difficult to determine how it stood, and what balance, if any, was coming to Oddie & Co., and whether any funds remained in the hands of the defendant which properly belonged to them, it is not apparent how the defendant could properly clear the statements of Oddie & Co. Great excitement and confusion prevailed in financial circles on the day named. Many of the members of the clearing-house had failed to perform their contracts for the purchase and sale of gold, and the clearing-house was thus left without funds to make deliveries to those who had made contracts with the defaulting members. The testimony of Mr. Oddie, one of the firm, shows that upon the day in question he called at the bank for the balance claimed to be due his firm, and the president of the bank informed him that there was confusion in the bank's business and that he could not tell how the statement stood. The testimony of the president of the bank and one of its officers at the time shows that Oddie & Co. were informed on that day that there had been some failures, and that Belden & Co. was one of them, and was in default, and that the bank would only pay approximate balances, reserving a margin to secure the defendant for these failures.

Even if there was a conflict between these statements, the testimony of Oddie himself clearly establishes that it was impossible at the time to determine how the balances stood and to clear the statements. It is apparent that the defendant on that day could not ascertain how matters were, and, in the face of the fact that Belden & Co. had failed, equally impossible to tell whether it had sufficient funds belonging to Oddie & Co. so as to be able properly to clear their statement. The evi-

dence shows that the defendant did all that it could toward clearing the accounts by making deliveries of estimated or approximate balances to the members, and in this way it paid to Oddie & Co. \$30,000 in gold on account. It also tends to establish the fact that they did the best they could under the pressure of the embarrassment then existing; that the amount paid to Oddie & Co. was paid to them rather as a matter of favor than otherwise, to relieve them so far as was practical and safe.

There was no promise, either express or implied, to pay them \$10,000 in gold in addition to the \$30,000 they had received; on the contrary, the payment itself indicated that no balance could be struck. The fact of a payment in part being made, under the circumstances then existing, was virtually a declaration by the defendant that it was unable to clear the statement of Oddie & Co. The evidence shows that the statement made by Oddie & Co. was not a statement of an account with the defendant; that it was not accepted as such or considered to be correct. It was never sanctioned by the defendant in accordance with the rules and regulations of the clearing-house. There was no account made or existing between Oddie & Co. and the defendant, and it is very plain, therefore, that no action would lie against the defendant upon an account stated.

Some stress is laid by the appellant's counsel upon the admission made on the trial that the Oddie & Co. statements were cleared by the defendant with the exception of Belden & Co., and that no controversy was made as to any other item on the statements, and it is claimed that as Belden & Co. only appeared on the first statement it was admitted that the second statement was cleared. As the two statements, as we have seen, are to be taken together as constituting the transaction of the entire day, we do not understand that this admission would bear any such interpretation. As already indicated the failure of Belden & Co. affected both statements and the whole transaction, and there is no ground for the contention that it is admitted the defendant cleared the entire statement.

The appellant's counsel seeks also to sustain the right of the plaintiff to recover, for the reason that no notice was given to Oddie & Co. of the failure of Belden & Co. so that they might protect themselves. This position is based upon the ground that the defendant was negligent in the performance of its duty. Taking all the evidence in connection there would seem to be sufficient to establish the fact that Oddie & Co. had notice of the failure of Belden & Co., and the referee erred in refusing to find as requested that the failure of Belden & Co. was well known to Oddie & Co. on the day named. Oddie himself swears, upon being asked whether he had heard of Belden & Co.'s failure before his conversation with the president of the bank, that he had heard rumors of it but could not get at the facts. The testimony of the two Benedicts is direct and positive as to Oddie being informed of the failure at the time, and his clerk, Davis, swears that he talked with Oddie on the subject that day after three o'clock. Oddie and his clerks were attending all that day at the Gold Exchange during the excitement, and Belden's name was posted there as having failed and his gold sold out to make up the difference before 12:30 o'clock of that day. A well-known fact of the character of the failure of Belden & Co. could hardly have escaped the attention of Oddie & Co., who were engaged and deeply interested in the transactions of that day, and if Oddie & Co. had notice of such failure, otherwise, the fact that the defendant did not give such notice to them is of no importance. In view of all the evidence the conclusion is irresistible that Oddie & Co. must have known of Belden & Co.'s failure early on the day of September twenty-fourth. If they did know it, then they lost nothing by not being notified by the defendant that such was the fact.

It may be remarked that even if Oddie & Co. were not notified of this failure, it is not apparent how they sustained any damage in consequence thereof. The claim that the plaintiff was entitled to recover of the defendant any sum whatever, even if the statement was not cleared, is, we think, without merit. As the statements must be regarded as one transaction for which

Statement of case.

a clearance was asked, there is no valid ground upon which the plaintiff could recover on account of a single item contained in the same.

No other point was presented which demands special attention.

The order of the General Term should be affirmed and judgment absolute ordered against the plaintiff on the stipulation, with costs.

All concur.

Order affirmed and judgment accordingly.

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URIAH SCHOLL, Appellant, v. THE ALBANY AND RENSSELAER
IRON AND STEEL COMPANY, Respondent.

A consignee, who is owner of the consigned cargo, is liable to the owner or master of the vessel for damages in the nature of demurrage, for unreasonable delay in discharging the cargo after arrival, although the bill of lading contains no stipulation as to demurrage, and prescribes no time within which the cargo shall be discharged.

By a bill of lading of a cargo of coal, the carrier was to discharge the cargo at the port of destination. On arrival he reported to the defendant, the consignee and owner of the coal, and requested to be discharged, offering to do the shoveling of the coal if defendant would provide for taking it away; this it declined to do, insisting that plaintiff should take his turn at the wharf, and he was detained some seven days over the customary time for discharging such cargo. In an action to recover demurrage, *held*, that there was in effect an offer to perform on the part of plaintiff, and that it was a question of fact to be determined upon all the circumstances whether there was unreasonable delay on the part of defendant in discharging.

Cross v. Beard (26 N. Y. 85), distinguished.

(Argued March 4, 1886; decided March 28, 1886.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made March 15, 1883, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

Statement of case.

This action was brought to recover damages in the nature of demurrage.

Plaintiff was the owner of a canal boat, the "*Irwin Scholl*," upon which was shipped a cargo of coal, to be transported to Hudson, N. Y., of which cargo defendant was the owner and consignee. By the bill of lading, plaintiff was to carry the coal and discharge it at the port of destination. On arrival, plaintiff reported to defendant and requested to be discharged, offering to do the shoveling of the coal if defendant would provide for taking it away. Three boats with cargoes from the same shipper had arrived ahead of plaintiff, and he was told he must wait his turn and be discharged at the same dock.

Plaintiff's boat was detained eleven days; three and one-half days was the customary time for discharging such a cargo. Defendant had another wharf and derrick.

J. A. Hyland for appellant. The consignee of a cargo, whether the cargo is to be discharged by the carrier or the consignee, is in duty bound, on notice of the arrival and readiness of the vessel to discharge her cargo, to provide a proper berth, customary facilities and room for unloading the cargo, and a dock such as the business ordinarily requires. If any delay to the vessel arises from the negligence of the consignee to furnish such berth, place or room for unloading the cargo, then the consignee is legally bound to pay for the use of said vessel while so detained, whether so provided in the bill of lading or not. (*Paquette v. A Cargo of Lumber*, 23 Fed. Rep. 301; *Fulton v. Blake*, 5 Biss. 371; 12 Am. L. R. 779.) In the absence of express agreement a contract is implied that the owner and consignee of goods will provide for discharging them in a reasonable time. (*Cross v. Beard*, 28 N. Y. 85, 91, 92.) The failing to designate a place at which the plaintiff could discharge his vessel, and holding his vessel there for defendant's own convenience, is sufficient to make defendant responsible for the use of the vessel after the customary and reasonable time to discharge had expired. (*Crawford v. Miller*, 1 Fed. Rep. 638; *Philadelphia & R. R. Co. v.*

Opinion of the Court, per ANDREWS, J.

Northam, 2 Ben. 1, 4; *Paquette v. A Cargo of Lumber*, 23 Fed. Rep. 301.)

Wm. C. Holbrook for respondent. If a bill of lading contains no provision for the payment of demurrage by the consignee, he is not liable therefor, even upon his acceptance of the cargo. (*Gage v. Morse*, 12 Allen [Mass.], 410; *Sprague v. West*, 1 Abb. Adm. R. 543; *Henly v. Brooklyn Ice Co.*, 14 Blatchf. 522; *Crawford v. Jessup & Moore Paper Co.*, 24 Fed. Rep. 303; *Fisher v. Abeel*, 44 How. Pr. 432; *Davidson v. Four Hundred Tons Iron Ore*, 18 Fed. Rep. 94.) Plaintiff should have at least made an unconditional demand for a dock from where he could have discharged himself. In accepting defendant's offer he elected to be discharged according to the usual course in the customary way, and at the dock where such cargoes were usually discharged. (*Groatstadt v. Whitt-hoff*, 15 Fed. Rep. 265-68; *Teilman v. Clark*, 17 id. 268; *McLaughlin v. Albany and Rensselaer Iron and Steel Co.*, 61 How. Pr. 439.)

ANDREWS, J. It seems to be the prevailing doctrine that a consignee, who at the same time is the owner of the cargo, is liable to the owner or master of the vessel for damages in the nature of demurrage, for an unreasonable delay in discharging the vessel after arrival, although the bill of lading contains no stipulation as to demurrage, and prescribes no time within which the cargo shall be discharged. (*Henley v. Brooklyn Ice Co.*, 14 Blatchf. 522; *Cross v. Beard*, 26 N. Y. 85; *Fulton v. Blake*, 5 Biss. 371.) The coal which formed the cargo of the "*Scholl*" had been purchased by the defendant of the shipper, and was shipped by the vendor to the defendant at Hudson. Upon the facts proved, the defendant as between it and the carrier was both owner and consignee of the cargo. The General Term reversed the judgment of the trial court on the ground that the plaintiff, the master of the "*Scholl*," in view of the fact that by the bill of lading he was not only to carry the coal but also to discharge it at the port of destination, was

bound, in order to put the defendant in default, to call upon the defendant on arrival to designate a place where it could be unloaded. We are of opinion that when the plaintiff on arrival reported to the defendant and requested to be discharged, and offered to do the shoveling of the coal if the defendant would provide for taking it away, which it declined to do, but insisted upon his taking his turn in unloading at the wharf, he did what was equivalent to an offer to perform the contract on his part. It then became a question of fact to be determined upon all the circumstances, whether there was unreasonable delay on the part of the defendant in discharging the vessel. We do not perceive that the case of *Cross v. Beard* (*supra*) has any material application. In that case the court reversed the judgment of the trial court in favor of the plaintiff, for the exclusion of evidence offered by the defendant, tending to show that the delay in unloading at the defendant's wharf was owing to a *vis major*, and was not the fault of the defendant. The fact that the defendant had declined upon the request of the plaintiff to allow him to unload at some other wharf, did not render the error harmless. The court held that it was for the jury to determine upon all the facts, whether the defendant had unreasonably delayed the discharge of the vessel. We think there was no error of law committed by the trial court, and we cannot, upon this appeal, review the findings of fact.

The judgment of the General Term should, therefore, be reversed, and the judgment of the trial court affirmed.

All concur.

Judgment accordingly.



MEMORANDA

OF THE

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.

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GEORGE F. NEUBAUER, Appellant, v. THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY, Respondent.

(Argued November 30, 1885 ; decided December 15, 1885.)

THIS was an action to recover damages for injuries to plaintiff, a mechanic in defendant's employ, alleged to have been caused by negligence on its part.

The following is the *mem.* of opinion :

"Here the defendant as master discharged its whole duty to the plaintiff. It furnished suitable materials, implements and machinery, and skilled and competent fellow-workmen, and the plaintiff's injuries were due to the carelessness of a co-servant, who at the time was acting as his foreman and boss. The principles laid down in *Crispen v. Babbitt* (81 N. Y. 516) control the decision of this case, and require the affirmance of this judgment."

I. W. Lyon for appellant.

Lewis E. Carr for respondent.

Per Curiam mem. for affirmance.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
CHARLES TAYLOR, Appellant.

(Argued December 1, 1885; decided December 15, 1885.)

M. Rumsey Miller for appellant.

I. W. Near for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

ALBERT DEFRESE et al., Respondents, *v.* THE CITY OF TROY
Appellant.

(Argued December 1, 1885; decided December 15, 1885.)

William J. Roche for appellant.

E. Countryman for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

GILES VAN HORNE, Appellant, *v.* WILLIAM CAMPBELL et al.,
Respondents.

Where plaintiff in an action of ejectment claims title in fee to the whole premises, and recovers judgment in accordance with his claim, and where the title set up is in fact invalid, but it appeared on the trial that plaintiff has an independent and unimpeachable title to an undivided share of the premises, it is in the discretion of the General Term, either to modify the judgment or to reverse it and grant a new trial; and its determination in the exercise of this discretion is not reviewable here.

(Submitted December 8, 1885; decided December 15, 1885.)

THIS was a motion for reargument.

The action was ejectment. The case is reported in 100 N. Y. 287.

The following is the *mem.* of opinion :

"There are insuperable difficulties in the way of granting this motion: (1) The plaintiff in his complaint claims title in fee to the whole premises. He recovered judgment in accordance with his claim. The General Term reversed the judgment and ordered a new trial on the ground that the devise over in the will of Jellis Fonda, upon which the plaintiff's claim to the whole title rested, was void, and the judgment of the General Term has been affirmed by this court.

It is now claimed that the General Term, instead of reversing the judgment absolutely, should have modified it by awarding a recovery for the undivided sixth part of the premises, as to which the plaintiff claims her title is unimpeachable. Assuming that the evidence conclusively established title in the plaintiff to this extent, the General Term was not bound to modify the judgment and award a recovery for the sixth part of the premises. It was in the discretion of the General Term either to modify the judgment, or to reverse it absolutely and leave the plaintiff on a new trial to assert his claim to an undivided share, and procure judgment therefor. This court cannot review the discretion of the General Term. (*Godfrey v. Moser*, 66 N. Y. 250.)

(2) The facts upon which the right of the plaintiff is based to recover an undivided share of the premises, are not found by the trial judge. The action was tried before the court, without a jury, and the findings upon the question of title relate solely to the claim of title under the devise over in the will of Jellis Fonda. It is only by looking into the evidence that the right of the plaintiff to a share of the premises by another and independent title could have been ascertained. But an examination of the evidence would not have disclosed an indisputable title in plaintiff to the one-sixth part. The original share which descended to his mother, a daughter of Douw Fonda, was one undivided fourth part, of which the plaintiff was entitled to an undivided one-eighth part

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
CHARLES TAYLOR, Appellant.

(Argued December 1, 1885; decided December 15, 1885.)

M. Rumsey Miller for appellant.

I. W. Near for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

ALBERT DEFREESSE et al., Respondents, *v.* THE CITY OF
Appellant.

(Argued December 1, 1885; decided December 15, 1885.)

William J. Roche for appellant.

E. Countryman for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

GILES VAN HORNE, Appellant, *v.* WILLIAM C
Respondents.

Where plaintiff in an action of ejectment claims title to premises, and recovers judgment in accordance with the title set up is in fact invalid, but it appeared or it has an independent and unimpeachable title to the premises, it is in the discretion of the General Term the judgment or to reverse it and grant a new trial in the exercise of this discretion is not review

(Submitted December 8, 1885; decided December

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
CHARLES TAYLOR, Appellant.

(Argued December 1, 1885; decided December 15, 1885.)

M. Rumsey Miller for appellant.

I. W. Near for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

ALBERT DEFRESE et al., Respondents, *v.* THE CITY OF TROY
Appellant.

(Argued December 1, 1885; decided December 15, 1885.)

William J. Roche for appellant.

E. Countryman for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

GILES VAN HORNE, Appellant, *v.* WILLIAM CAMPBELL et al.,
Respondents.

Where plaintiff in an action of ejectment claims title in fee to the whole premises, and recovers judgment in accordance with his claim, and where the title set up is in fact invalid, but it appeared on the trial that plaintiff has an independent and unimpeachable title to an undivided share of the premises, it is in the discretion of the General Term, either to modify the judgment or to reverse it and grant a new trial; and its determination in the exercise of this discretion is not reviewable here.

(Submitted December 8, 1885; decided December 15, 1885.)

THIS was a motion for reargument.

The action was ejectment. The case is reported in 100 N. Y. 287.

The following is the *mem.* of opinion :

"There are insuperable difficulties in the way of granting this motion : (1) The plaintiff in his complaint claims title in fee to the whole premises. He recovered judgment in accordance with his claim. The General Term reversed the judgment and ordered a new trial on the ground that the devise over in the will of Jellis Fonda, upon which the plaintiff's claim to the whole title rested, was void, and the judgment of the General Term has been affirmed by this court.

It is now claimed that the General Term, instead of reversing the judgment absolutely, should have modified it by awarding a recovery for the undivided sixth part of the premises, as to which the plaintiff claims her title is unimpeachable. Assuming that the evidence conclusively established title in the plaintiff to this extent, the General Term was not bound to modify the judgment and award a recovery for the sixth part of the premises. It was in the discretion of the General Term either to modify the judgment, or to reverse it absolutely and leave the plaintiff on a new trial to assert his claim to an undivided share, and procure judgment therefor. This court cannot review the discretion of the General Term. (*Godfrey v. Moser*, 66 N. Y. 250.)

(2) The facts upon which the right of the plaintiff is based to recover an undivided share of the premises, are not found by the trial judge. The action was tried before the court, without a jury, and the findings upon the question of title relate solely to the claim of title under the devise over in the will of Jellis Fonda. It is only by looking into the evidence that the right of the plaintiff to a share of the premises by another and independent title could have been ascertained. But an examination of the evidence would not have disclosed an indisputable title in plaintiff to the one-sixth part. The original share which descended to his mother, a daughter of Douw Fonda, was one undivided fourth part, of which the plaintiff was entitled to an undivided one-eighth part

only. His title to any greater interest depends upon the assumption that Mrs. Wemple's share of her father's estate, descended to her heirs, and that as to that share the defendants have not acquired a title by adverse possession. This assumption is not upon the evidence incontrovertible. The defendants are at least entitled to be heard upon that question.

"The motion should be denied."

Amasa J. Parker for motion.

Horace E. Smith opposed.

ANDREWS, J., reads for denial of motion.

All concur.

Motion denied.

101	610
136	179

THE PEOPLE, ex rel. WALLKILL VALLEY RAILROAD COMPANY,
Respondent, v. NATHAN KEATOR et al., Assessors, etc., Appellants.

Where upon a copy of a judgment served was indorsed the name of the attorney with his post-office and business address, and below was indorsed a notice of judgment signed by the attorney without giving any address, *held*, that this was a sufficient compliance with the rule of practice (Rule 2), requiring papers served to be indorsed or subscribed by the attorney, with his address, etc.

For the purposes of an appeal, a judgment in proceedings by *certiorari* to review an assessment under the act of 1880 (Chap. 269, Laws of 1880) is to be considered as an order, and an appeal to this court must be taken within the time prescribed for appeals from orders, *i. e.* sixty days.

(Argued December 8, 1885; decided December 15, 1885.)

THE following is the opinion herein:

"This is a motion to dismiss an appeal to this court on the ground that it was not taken within the time prescribed by law.

"The relator conceiving itself aggrieved by the assessment made by the defendants as assessors of the town of Rosendale,

101	610
172	1 42

Ulster county, procured a writ of *certiorari* to review the assessment under the act (Chap. 269 of the Laws of 1889). Upon the return of the writ a hearing was had at the Special Term where the assessment was reduced. The defendants then appealed to the General Term, where the decision of the Special Term was affirmed and a judgment of affirmance was entered on the 22d day of July, 1885, and notice thereof was given to the attorney for the defendants on the same day. From that judgment the defendants appealed to this court, on the 20th day of November, 1885. The defendants claim that their time to appeal was limited only by section 1325 of the Code of Civil Procedure, under which, if applicable, they had the right to appeal at any time within one year after the judgment was entered. The relator claims, however, that the appeal was regulated by section 7 of the chapter above referred to, which provides that "appeal may be taken by either party from an order, judgment or determination under this act as from an order, and shall be heard and determined in like manner," and hence that the appeal should have been taken to this court within sixty days after service upon the attorney for the appellants of a copy of the judgment appealed from and a written notice of the entry thereof. We think the contention of the relator is right and that the motion should be granted.

"Chapter 269 provides a new and complete system for reviewing upon *certiorari* and correcting errors of assessors; and all the provisions of the act show that it was the intention of the legislature that the proceedings should be speedily conducted and speedily brought to a termination. Section 8 provides that the assessment-roll shall be finally completed and filed, and notice thereof given on or before September first in each year, and section 2 provides that the writ shall not be granted unless application therefor shall be made within fifteen days after the completion and delivery of the assessment-roll and notice thereof given as provided in the act; that the writ shall not stay the proceedings of the assessors or other officers to whom it is directed, or to whom the assessment-roll may be delivered, to be acted upon according to law. Section 3 provides that the justice granting the writ shall prescribe in the writ the time within which a return thereto must be made,

which shall not be less than ten days. Section 7 provides that all issues and appeals in any proceedings instituted under the act shall have preference over all other civil actions and proceedings in all courts. Section 8 provides that if final judgment shall not be given in time to enable the assessors or other officers to make a new or corrected assessment for the use of the board of supervisors at their annual session, and it shall appear from the judgment that the assessment was illegal, erroneous or unequal, then there shall be audited and allowed to the petitioner, and included in the next year's tax levy and paid to the petitioner the amount with interest thereon, in excess of what the tax should have been as determined by the judgment.

"It was undoubtedly expected by the law-makers, that as the writ was required to be procured in September, the proceeding would be brought to a determination in time for the action of the supervisors at their succeeding annual meeting, and such must generally be the result. The provisions of section 7 accomplish three things: 1. That all issues and appeals instituted under the act shall have preference over all other civil actions and proceedings in all courts. 2. That every final decision under the act for the purpose of appeal shall be treated as an order, and hence that an appeal to this court shall be placed on the order calendar and not be subject to the delay which might occur if it were required to be placed upon the general calendar; and, 3. Appeals to this court must be within the time specified for appeals from orders, to-wit: Sixty days, rather than one year. The provision is that appeal may be taken as from an order, and shall be heard and determined as an appeal from an order. We do not think that this is merely permissive, and that an appellant has the option to appeal either under the Code or under the section named. The provision is a part of the whole scheme, and was intended to provide the precise way in which an order, judgment or determination under that act could be reviewed. If that section is not to receive this construction, then great delay might ensue the decision of the General Term. The appellant might wait a year before bringing his appeal and then some time might elapse before it could get upon the calendar of this court so as to entitle it to the preference given

by that section. We think the plain purpose of the act, as well as the public convenience, requires that we should give the construction contended for by the counsel for the relator.

"It was, however, claimed on the part of the appellants, that their time to appeal was not limited by a proper notice.

"The counsel for the relator served upon the appellants a copy of the order of the General Term affirming the decision of the Special Term with a notice on the back thereof, stating that it was a copy of the order and when and where it was filed and entered. That notice was signed 'P. Cantine, attorney for respondents,' without in any way indicating his post-office address or place of business. In pursuance of the order of the General Term the relator's costs were taxed and a formal judgment of affirmance, and for costs, was entered on the twenty-second day of July, and a copy of that judgment was served upon the appellants' attorney, and on the back of it was indorsed the title of the cause and 'P. Cantine, attorney for respondents, office and post-office address, Saugerties, Ulster Co., N. Y.,' and below that, signed by the same attorney without his post-office and business addresses, was a notice stating that the paper served was a copy of a judgment of affirmance with costs, and giving the date and place of its entry in the clerk's office of Ulster county.

"The judgment referred to in that notice was the judgment appealed from, and if rule 2 of the general rules of practice of the Supreme Court applies to an appeal to this court, the motion was a full and precise compliance with that rule, because it was indorsed on the back with the name of the attorney with his post-office and business address. The notice was, therefore, sufficient to limit the appellants' time for appeal, and the appeal not having been brought within sixty days, the time prescribed for an appeal from an order to this court, it was too late and it should be dismissed, with costs."

Peter Cantine for motion.

A. T. Clearwater opposed.

EARL, J., reads for dismissal of appeal.

All concur.

Appeal dismissed.

101 616
118 263
118 266

DANIEL LORD, JR., as Trustee, etc., Respondent, *v.* THE YONKERS FUEL GAS COMPANY et al., Appellants.

The "franchises, privileges, rights and liberties," which under the act of 1878 (Chap. 163, Laws of 1878) ; a manufacturing corporation is authorized to mortgage, to secure the payment of a debt, upon consent of the requisite number of stockholders, and which are not included in a consent to mortgage the real and personal estate of the corporation, are the corporate rights and franchises which became vested in the company by virtue of its organization as a corporation. Those terms do not include patent rights, licenses, easements, or privileges acquired by the company after its incorporation, either from individuals or other corporations ; these are in the nature of property, and are, therefore, included in a consent to mortgage the corporate property.

(Submitted December 8, 1885 ; decided December 15, 1885.)

THIS was a motion to correct the remittitur herein.

The case is reported, 99 N. Y. 548. It was there held that a mortgage executed upon consent of stockholders to mortgage the real and personal estate of a manufacturing corporation, so far as it purported to include the franchises, privileges, rights or liberties of the corporation, was invalid and inoperative, and these were directed to be excluded from sale on foreclosure of the mortgage.

The following is the *mem.* of opinion on the motion :

" 'The franchises, privileges, rights and liberties,' directed to be excluded from the sale are those referred to in chapter 163 of the Laws of 1878, which we understand to be the corporate franchises and rights which became vested in the company by virtue of its organization as a corporation under the general law. We do not understand that these include patent rights, licenses, easements or privileges acquired by the company since its incorporation, either from individuals or corporations; these are in the nature of property of which the company had the power to dispose, and it was not the intention of the court to direct that they be excluded from the sale. The remittitur follows the language of the act of 1878, and we do not think that it needs amendment. These views are sustained by the following cases cited by the respondent. (*Bridgeport v. N.*

Y. & N. H. R. R. Co., 36 Conn. 255; *Chicago R. R. Co. v. People*, 73 Ill. 541; *Morgan v. Louisiana*, 3 Otto, 223.)
The motion should be denied, without costs."

Ralph E. Prime for motion.

Calvin Frost opposed.

RAPALLO, J., reads mem. for denial of motion.

All concur.

Motion denied.

JAMES F. HALL, Respondent, v. BENJAMIN F. CHANDLER, Appellant.

(Argued December 2, 1885; decided December 22, 1885.)

Leslie W. Russell for appellant.

John W. Kellogg for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE KEROSENE LAMP HEATER COMPANY, Appellant, v. JOHN F. RATHBONE et al., Respondents.

(Argued December 2, 1885; decided December 22, 1885.)

B. F. Lee for appellant.

Esek Cowen for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JAMES W. SMITH et al., Appellants, v. CITY OF BROOKLYN,
Respondent.

This case presented the same questions and was argued and decided with *Steers v. City of Brooklyn*, ante, p. 51.

GEORGE A. KENT et al., Respondents, v. LEONARD FRIEDMAN,
Appellant.

Where an executory contract for the sale of goods is with warranty, that they shall be good, sound, and all right, and equal to a sample shown, an acceptance of the goods after opportunity to examine them does not preclude the purchaser from claiming and recovering damages for breach of the warranty.

(Submitted December 4, 1885 ; decided December 22, 1885.)

THE following is the *mem.* of opinion herein :

"This action is to recover damages for breach of warranty upon an executory sale of tobacco by the defendant to the plaintiffs. The facts as found by the referee, upon sufficient evidence, must be taken as true that the sale was by sample, the defendant representing that the sample was a true sample of the tobacco sold, and that the tobacco was not only as good as the sample, but good, sound, and all right. Upon these facts a breach of warranty and damages being proved, the only defense open to the defendant was the acceptance of the tobacco by the plaintiffs. That such a warranty survives acceptance has been repeatedly decided by this court, the last time in *Brigg v. Hilton* (99 N. Y. 517). In that case there was an executory contract for the sale of cloths by samples which were sound and perfect, the plaintiffs representing that the cloths were of similar fabric and similar quality, equal in every respect to the samples ; and it was held that acceptance by the defendants of the cloths, after opportunity for their examination, did not preclude them from claiming and recovering damages for breach of the warranty. That case is not distinguishable from this and must control our decision.

"We have considered all defendant's exceptions to rulings upon questions of evidence, and are satisfied that they point out no prejudicial error.

"The judgment should be affirmed, with costs."

Alex. Cumming for appellant.

D. S. Richards for respondents.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

JAMES C. FITZPATRICK, Appellant, *v.* THE NEW YORK AND
MANHATTAN BEACH RAILWAY COMPANY, Respondent.

(Argued December 7, 1885; decided December 22, 1885.)

F. R. Coudert for appellant.

Alfred C. Chapin for respondent.

Agree to reverse order on dissenting opinion of Judge BRADY at General Term.

All concur.

Order reversed and judgment affirmed.

JOHN C. MONTY, Respondent, *v.* WILLIAM H. BLOOMINGDALE,
Appellant.

(Argued October 7, 1885; decided January 19, 1886.)

Isaac Larson for appellant.

Lyman H. Northup for respondent.

Agree to affirm; no opinion.

All concur, except DANFORTH, J., not voting.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
PATRICK KIERNAN, Appellant.

(Argued November 25, 1885; decided January 19, 1886)

The defendant was convicted of murder in the first degree. Upon the trial a challenge to the array of jurors was interposed by his counsel. The portion of the opinion in reference thereto is as follows:

"The prisoner's challenge to the array was made in writing; issue taken by the district attorney upon its alleged facts; that issue tried by the court; and the challenge overruled. It averred, as the error in drawing the panel of additional jurors ordered by the court, "that the names of such jurors were not drawn from the box or boxes by the court directed publicly, in open court, in the presence of the court as by law provided." The broadest possible construction of this language would result in an averment of but two facts; one that the names of additional jurors were not drawn from the box directed by the court; and the other, that they were not drawn in open court. The mode of drawing is prescribed in detail by the Code of Civil Procedure. (§ 1035, etc.) There are three boxes provided for the ballots, on which are the names of the jurors selected to serve for three years. Box number 1, at the beginning of the three years term, contains the names of all the jurors liable to be drawn. Box number 2 as terms are held, contains the names of jurors who have been drawn and served. And box number 3 contains duplicate ballots of the trial jurors selected who reside in the city or town where a trial term is appointed to be held. So that box number 1 is the ordinary source of supply, and box number 3 is provided for an emergency when there is no time to call jurors from a distance. As the terms proceed the names of jurors who have served are placed in box number 2, so that the contents of boxes 1 and 2 are continually changing. If during the three years the ballots in box number 1 become exhausted the drawing goes on from box number 2, until the new lists are transmitted. (§ 1051.) When additional jurors are found necessary at a term of the

court an order is made "requiring the clerk of the county to draw and the sheriff to notify any number of trial jurors specified in the order which the court deems necessary." (§ 1058.) In the present case that order was made and entered, containing all the prescribed requisites. By the next section (§ 1059) the mode of obeying the order is fixed. "The clerk must thereupon forthwith bring into court all the boxes wherein ballots containing the names of trial jurors are deposited as prescribed in this article; and must, in the presence of the court, publicly draw from such box or boxes as the court directs the number of trial jurors specified in the order." It is now said that all the boxes were not brought into court. No such omission was alleged in the prisoner's challenge. That specified no irregularity from the absence of requisite boxes, and no evidence upon the subject was needed or produced. There was no such issue, and no proof to maintain it. If the statements of the clerk that "only one box was brought into court" and that "there is only the one box to bring in and draw from," establish that the other two were not already in court, and were not brought in, the irregularity would be purely formal, and work no possible harm to the prisoner, if the court selected the box. The clerk testified that the one hundred and fifty additional jurors required by the order were drawn by him "in open court," and "from the box directed by the court." The irregularities alleged in the challenge were thus directly disproved, and justified the court in overruling it. It is contended, however, that the court did not direct from which box the names should be drawn. The clerk swears that such direction was given, and he obeyed it. If none was given, except by the formal order entered, that was sufficient. It identified the box to be brought in and drawn from as the one "containing the names of trial jurors for said court." This language must be construed to mean the box of ordinary supply and containing the names of all the trial jurors liable primarily to serve at that term of the court, and that could only have been box number 1. It could perhaps be said that the order might have referred to either of the others, and so was ambiguous. But conceding so much, the court must have understood its

own order, and the drawing having occurred in its presence and with its assent, must have been from the box intended and directed. We do not think that any irregularity was established."

The remainder of the opinion is taken up with a discussion of the facts; the court holding that the testimony justified the conviction.

Benjamin W. Downing for appellant.

John Fleming for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

PETER DEBAUN, Appellant, *v.* FRANK E. BEAN et al., Respondents.

(Argued December 4, 1885; decided January 19, 1886.)

George W. Weiant for appellant.

J. A. Hyland for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

LUTHER A. WING, Respondent, *v.* ERASTUS RAPALEE, Appellant.

(Argued December 4, 1885; decided January 19, 1886.)

J. F. Parkhurst for appellant.

M. Rumsey Miller for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ROBERT J. DEAN, Respondent, v. HENRY D. VAN NOSTRAND
et al., Appellants.

(Argued December 7, 1885 ; decided January 19, 1886.)

DECIDED upon the facts.

William G. Wilson for appellants.

Edward S. Hatch for respondent.

FINCH, J., reads for affirmance.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

THE BELGIAN GLASS COMPANY, Respondent, v. THEODORE
PABST et al., Appellants.

The parties entered into a contract by which defendants agreed to sell the goods manufactured by plaintiff on commission. Plaintiff guaranteed to supply defendants with goods to at least the value of a sum specified, and in case of failure so to do defendants were entitled to the agreed commissions on that sum. Either party had the right to terminate the agreement by giving to the other a year's notice. In an action to recover proceeds of sales in defendants' hands, the referee found that plaintiff was led, by acts and assurances of defendants, to believe that they would only charge commissions thereafter on actual shipments, and were induced thereby to refrain from giving notice of a termination of the agreement. *Held*, that defendants were estopped from claiming thereafter commissions under the guaranty in the contract.

(Argued December 7, 1885 ; decided January 19, 1886.)

THIS was an action to recover a balance alleged to be in defendants' hands ; the proceeds of goods sold by them as agents for plaintiffs. Defendants claimed that the sum retained was commissions to which they were entitled to under the contract between the parties. The substance of the contract is stated in the head-note. The following is an extract from the opinion.

"The court is asked to reverse the judgment in this case, on

the ground that the finding of the referee that the defendants were estopped from claiming the guaranteed commission on the deficiency of shipments in 1876, under the contract of June 3, 1872, is unsupported by any evidence. The referee found in substance that the plaintiff was induced by the acts and conduct of the defendants to forego, in January, 1875, the giving of a year's notice of the termination of the contract, the right to do which, at any time, was reserved therein, upon the belief that they would not claim commissions, except on actual shipments made by the plaintiff. If notice of the termination of the contract had been given at that time, the question presented on this appeal could never have arisen.

"We think there can be no doubt in point of law, that if the defendants induced the plaintiff to believe that they would not thereafter claim commissions, except on actual shipments, and that in reliance upon such assurance, made in words or by conduct equivalent to words, the plaintiff forbore to give notice, the doctrine of equitable estoppel applies, not perhaps working in a strict sense a modification of the contract."

The remainder of the opinion is taken up with a discussion of the evidence, the court reaching the conclusion that it justified the finding of the referee.

William H. Waring for appellants.

Frederick R. Coudert for respondent.

ANDREWS, J., reads for affirmance.

All concur.

Judgment affirmed.

JOHN E. STYLES, Respondent, v. JOHN B. FULLER, Appellant.

The rights of parties in a legal action are to be determined as they were at its commencement, unless some event happening subsequently and affecting those already in issue is presented by supplemental pleading.

Where, therefore, the answer in an action was a general denial, and defendant on the trial offered to prove that after the commencement of the

101	622
148	845

101	622
77 AD	417

action plaintiff was adjudged a bankrupt and the cause of action passed to his assignee, which offer was rejected. *Held* no error.

(Argued December 7, 1885 ; decided January 19, 1886.)

The following is the *mem.* of opinion herein :

" This suit was commenced in June, 1876. The complaint stated a good cause of action, and the answer of the defendant was in substance a general denial. The verdict of the jury upon the issues thus found was in favor of the plaintiff, and sustained his allegations. To defeat a recovery the defendant on the trial offered to prove that in May, 1877, the plaintiff was adjudged a bankrupt, and the alleged cause of action passed to his assignee. The offer was properly rejected. The rights of parties to a legal action are to be determined as they were at its commencement, unless some event, happening subsequently, and affecting those already in issue, is presented by supplemental pleadings to the court. Here the matter offered in evidence was not pleaded, and for that reason, if no other, was properly excluded. No other question is presented to justify this appeal. It should, therefore, fail and the judgment be affirmed."

Edwin G. Davis for appellant.

Win. F. Macrae for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

CALEB W. LORING, Executor, etc., Respondent, v. AMOS BINNEY et al., Respondents, JAMES M. JACKSON, Appellant.

(Argued December 8, 1885 ; decided January 19, 1886.)

Henry H. Man for appellant.

William Watson for respondents.

Agree to affirm ; no opinion.
All concur.
Order affirmed.

In the Matter of the Opening of RIVERSIDE PARK, etc.
(Argued December 8, 1885 ; decided January 19, 1886.)

James A. Deering for appellants.

Alexander B. Johnson for respondent.

Agree to affirm ; no opinion.
All concur.
Order affirmed.

In the Matter of the Estate of BURGESS CLUFF, Deceased,
EDWARD E. TOWER, Executor, etc., Appellant.

(Argued December 8, 1885 ; decided January 19, 1886.)

D. C. Calvin for appellant.

Edward B. Whitney for respondent.

Agree to dismiss appeal ; no opinion.
All concur.
Appeal dismissed,

HENRIETTA T. FLAGG, Respondent, v. THE MANHATTAN RAIL-
WAY COMPANY, Appellant.

(Argued December 9, 1885 ; decided January 19, 1886.)

Edward S. Rapallo for appellant.

W. P. Prentice for respondent.

Agree to affirm ; no opinion.
All concur, except RAPALLO, J., taking no part.
Judgment affirmed.

J. MORRIS CHILDS et al., Appellants, v. HORACE F. KENDALL,
as Assignee, etc., Respondent.

101 686
194 955

(Argued December 10, 1885 ; decided January 19, 1886.)

Alexander T. Goodwin for appellants.

Waters, McLennan & Dillaye for respondent.

Agree to affirm order and for judgment absolute on stipulation.

All concur ; no opinion.

Order affirmed and judgment accordingly.

HENRY O. DEMMING, Respondent, v. EDWARD M. PARROTT,
Appellant.

(Argued December 10, 1885 ; decided January 19, 1886.)

Henry Bacon for appellant.

Thomas G. Evans for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ELIZA ANN LONGENDYKE et al., Respondents, v. CHARLES
ANDERSON, Appellant.

101 686
182 436

(Argued December 11, 1885 ; decided January 19, 1886.)

The following is the opinion in this action in full :

"The sole question in this case is whether the plaintiffs are the owners by a sufficient and effective grant of a right of way over the lands owned by the defendant. The action is brought in equity and aims to establish the right claimed, and to re-

strain any interference or obstruction. The course of the trial takes out of the case any title by prescription or flowing from user, and unless we can trace a title by grant which has passed to the plaintiffs, the judgment is wrong and there must be a new trial.

"The premises of both parties are situated in what was the Loveridge patent in 1686, and a portion of which became the property of Dennis and Jacobus Hegeman who, in 1760, released to each other and held to some extent in severalty. Jacobus conveyed to Spawn & Burger, and Dennis to Paulus Smith. The premises covered by these conveyances are shown upon a map put in evidence, which is conceded to be substantially correct. By that it appears that the tract owned by the Hegemans was nearly in the shape of a parallelogram, extending westerly from the Hudson river to what is called the Kalckberg; but narrow at the western end and growing steadily wider by the spread of its northern and southern lines as the river is approached. By these conveyances, Spawn & Burger on the one hand, and Paulus Smith on the other, became the owners of the Hegeman tract, partly in severalty and partly as tenants in common. The principal dividing line between them ran north and south through nearly the middle of the tract; Spawn & Burger on the east and Paulus Smith on the west; and their respective premises extending entirely across the parallelogram, and so blocking Smith's access to the river, and Spawn & Burger's to the Kalckberg. But these grantees took also from Hegemans two parcels which were held by them in common; one in the north-east corner of the parallelogram and lying on the river, and one in the south-west corner at the Kalckberg. Smith could not get to his river lot, except by crossing Spawn & Burger's lot, and the latter could not get to the Kalckberg without crossing the lands of Smith; so that a way open to both parties from the river to the hill, was a matter of necessity. Accordingly, we find that the respective deeds reserved a right to each to cross the lands of the other by a way or road which ran from near the canoe place on the river to the Kalckberg. It is described as 'liberty for a road in the most convenient manner,' and the existing emergency

renders it highly probable that such a way substantially through the middle of the tract was established and used. By the death of Paulus Smith, his lands passed to his son Frederick, who retained the right to the river, and was burdened with the corresponding right to the hills. Before his death, as appears by the recital in one of the deeds, Paulus Smith divided with Spawn & Burger the two lots on the river and at the Kalckberg, so that thereafter each held his portion in severalty instead of in common. The two lots of Smith are numbered on the map as No. 3 and No. 6; the former lying on the hill and the latter on the river. In 1774, Frederick Smith conveyed to Johannes Sax, and Margaret, his wife, the south half of his main farm and an undivided half of No. 3 and No. 6, and at the same time conveyed to Nicholas Trumpbour and Elizabeth, his wife, the north half of the main farm and a moiety of No. 3 and No. 6. Both parties claim title under Frederick Smith through these deeds; the plaintiffs under Sax, and the defendant under Trumpbour. The latter chain of title seems to be substantially complete, but in the former there is a break, no conveyance proved showing a transfer from Sax to Abram Post, from whom plaintiffs' title came. Assuming, as we deem probable, that such difficulty might be surmounted, it becomes important to consider whether the deed of Frederick Smith to Sax gave him any right of way over the north half conveyed to Trumpbour. The first provision relates wholly to the burden resting upon the land by reason of the right of way belonging to Spawn & Burger. In severing the land burdened, Smith evidently desired and sought to equalize the burden between his grantees; and so he provides in each of the deeds, 'always saving and reserving a road for Philip Spawn and Johannes Burger, their respective heirs and assigns, from the landing place at Green Island to the Kalckberg; and if one-half of the road cannot conveniently be laid on the northernmost moiety or half part, and the other half on the southernmost moiety or half part, in that case the parties holding said parts are to allow land in compensation to the parties who shall bear the greatest half of the road, so much as is above the one-half, so that it may always be understood, and it is the intent

and meaning of these presents that each half lot shall bear half the road, or allow land in compensation of the same.'

"It is apparent from this provision that the right of way which belonged to Spawn & Burger over the Smith lot had either not been specifically located or was intended to be changed so as to impose equality of burden upon the severed parcels. If the road ran along the line it was merely a right of way for Spawn & Burger. Nothing else was reserved. Sax got no right upon Trumbour's land, and the latter none upon the premises of the former. Each simply owned the fee up to his own line. If each used it, as is quite probable, it was by mutual assent or common sufferance, and not by virtue of a reservation which only recognized and provided for the right of others than themselves. We pass now to other parts of the deed to see if Sax acquired any interest in Trumbour's land occupied by Spawn & Burger's easement. The conveyance adds, "with full and free liberty to and for the said Johannes Sax, his heirs and assigns to have a free landing to Hudson river, to erect a storehouse, land goods, store wood, stack hay, and fence the same; and also to have a canoe at a place called the canoe place; * * and also free liberty of passing and repassing at all times into, through and out of the said last-mentioned lot No. 6, to and from the said canoe place with horses, wagons and other carriages; and also to the like liberty of passing and repassing at all times as well over and through lot No. 5 as lot No. 4, of the said division to and from the said lot No. 6, and common landing." Recurring again to the map, we find that lots 4 and 5 were respectively the lots of Spawn & Burger. The rights thus conveyed to Sax, and the same were given to Trumbour, secured to him, first, a landing on the river and a right of way from that landing to lot No. 6. This right was a burden only upon Spawn & Burger's land. And second, the deed conveyed to Sax and Trumbour respectively a right of way across lots 4 and 5 to lot 6, and the landing. This again conveyed the easement in Spawn & Burger's lands, lying to the eastward, and between Smith and the river, and purported to give neither to Sax or Trumbour any right, one in the lands of the other. These deeds, it will be observed, make no mention of a right

of way for either Sax or Trumpbour westward to the Kalckberg; and the reason becomes apparent when we examine the map. Sax needed no such right, for his south half adjoined No. 3, and access to his moiety of it was wholly within his own discretion. Trumpbour could reach it at the intersection where his south-west corner and the north-east corner of No. 3 became identical. In so doing he would cross the corner of Sax to which his deed gave him no right, but which might possibly be a way of necessity. And both parties could avail themselves of the right given across lots 4 and 5, without either trespassing upon the land of the other. It is difficult to see, therefore, how reserving a right of way to Spawn & Burger along the line between Sax and Trumpbour could give to either of the latter a right not granted in the land of the other. It did not pass under the word "appurtenances." Even if, at the date of their deeds, the road existed along the line, which the conveyances make somewhat improbable, the right of way would only be Spawn & Burger's and an appurtenance of their lands. This right of way in Smith and before severance was in no sense an easement since he owned the fee, and passed and repassed by virtue of his ownership; when he severed that ownership there was no easement of his to pass. He might indeed create one, but a non-continuous easement, like a right of way, will pass only by words sufficient to create a new easement and annex it to the newly-made dominant tenement, and the word "appurtenances" is not sufficient. (*Parsons v. Johnson*, 68 N. Y. 66.) We do not see, therefore, how Sax's deed gave him any right in the lands of Trumpbour. We have read carefully and given much consideration to the view taken by the learned trial judge. The whole force of that argument lies in the assumption that as to the adjoining owners the road along the line existing solely for the benefit of third parties was held by such owners as tenants in common. That is untrue in point of fact. Each owned in severalty and in fee his own half of the road, and so far as it was an easement it belonged wholly to Spawn & Burger, to whose lands alone it was appurtenant; and Sax and Trumpbour could not be tenants in common in an easement which they did not own at all. Very probably, the

parties would use the road for their own convenience, but, as against each other, this would be by sufferance, and not by a right lying in grant.

"There is a further difficulty in the plaintiffs' case. Assuming still that they held under Smith notwithstanding the break in their chain, they took their title through a deed given to Nicholas Trumpbour, Jr., in 1807, by Abram Post, and a conveyance from the former in 1822, to the predecessors in title of the plaintiffs. But while Nicholas Trumpbour, Jr., owned the south parcel, and in 1810, he became the owner under the will of Elizabeth Trumpbour, who was the surviving grantee in joint tenancy of Frederick Smith, of an undivided one-fourth of the north parcel, and thereupon, by a full covenant deed, without reservation or condition, conveyed all the undivided fourth part of the north parcel. If, then, he had an easement in that part of the road lying on the north parcel he should have reserved it if he did not mean to part with it. It is difficult to see how after this conveyance with covenants of warranty he could still claim an easement in the land, his entire right in which passed by his deed. And if he could not claim it his grantees could not.

"For these reasons we feel constrained to send the case back for a re-trial.

"The judgment should be reversed; new trial granted; costs to abide the event."

R. E. Andrews and Joseph Hallock for appellant.

Fred Werner for respondents.

FINCH, J., reads for reversal and new trial.

All concur, ANDREWS, J., on first ground stated in opinion.
Judgment reversed.

BARRETT'S, PALMER & HEAL DYEING ESTABLISHMENT, Respondent, v. W. MOORE WHARTON et al., Appellants.

(Argued December 14, 1885 ; decided January 19, 1886.)

THIS was an action to recover the contract-price for dyeing a quantity of plain bunting. Defendants set up in their answer that the work was unskillfully done and as a counter-claim sought to recover the damages occasioned thereby.

The referee and the General Term agreed that the evidence substantiated defendants' claim, that the work was unskillfully done, and that defendants sustained damage by reason thereof, and were entitled to counter-claim the loss, also that the true measure of damages was the difference at the date of delivery of the dyed buntings between their then market value and the market value of the same goods skillfully and properly dyed. To establish the latter, defendants proved actual contracts of sale negotiated by them sufficient to have exhausted the entire stock if it had been in all respects merchantable and equal to the represented and sample gradé. *Held*, that "such a sale and disposition of the goods at wholesale and in large quantities and during the ordinary market season for such goods was clearly within the contemplation of the parties."

The General Term differed with the referee as to the sufficiency of the evidence to establish the market value of the goods as they were returned. The court here, after a review of the evidence, concurred with the referee.

Francis Lynde Stetson for appellants.

John A. Taylor for respondent.

FINCH, J., reads for reversal of order of General Term and for affirmance of judgment entered on report of referee.

All concur.

Order reversed and judgment affirmed.

PATRICK DUFFY, Appellant, *v.* THE NEW YORK AND MANHATTAN BEACH RAILWAY COMPANY, Respondent.

(Argued December 14, 1885 ; decided January 19, 1886.)

Samuel D. Morris for appellant.

Alfred C. Chapin for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
DANIEL T. DONOVAN, Appellant.

The provision of the Code of Criminal Procedure (§ 527, as amended by chapter 860, Laws of 1883), authorizing the appellate court to order a new trial in a criminal action, although no exceptions were taken on trial, applies only to the Supreme Court; this court has no authority to review the judgment unless exceptions have been duly and properly taken.

(Argued December 16, 1885 ; decided January 19, 1886.)

THE defendant was convicted of the crime of murder in the second degree.

The points presented upon the appeal appear in the following extract from the opinion :

" Upon the argument of this appeal, no exception to any ruling of the trial court was pointed out by the appellant's counsel as a ground for a reversal of the conviction of the defendant, and after a careful examination of the case and exceptions, we are satisfied that none was taken which authorize a reversal.

" The appellant urges that upon a consideration of the whole case, if the court should be of the opinion that injustice had been done to the defendant, it is authorized by section 527 of the Code of Criminal Procedure to order a new trial.

" We have frequently decided that the powers conferred by that section were intended to be exercised by the Supreme

Court alone, and that we have no authority to review a judgment in a criminal action, unless exceptions have been regularly and properly taken to the rulings of the trial court."

Charles H. Reed for appellant.

DeLancey Nicoll for respondent.

RUGER, Ch. J., reads for affirmance.

All concur.

Judgment affirmed.

LUCY A. MICHELSON, Appellant, *v.* ELISHA S. FOWLER et al.,
Respondents.

(Argued December 16, 1885; decided January 19, 1886.)

A. P. Smith for appellant.

Cornelius E. Stephens for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ROBERT H. CRANDALL, Appellant, *v.* THE BOARD OF EDUCATION
OF UNION FREE SCHOOL DISTRICT NO. 1 OF THE TOWN OF
BOONVILLE, Respondent.

(Argued December 16, 1885; decided January 19, 1886.)

Edwin H. Risley for appellant.

Bentley & Jones for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

SICKELS — VOL. LVI.

THOMAS NELSON, Individually and as Trustee, etc., et al., Respondents, *v.* JOHN V. PURDY et al., Appellants.

(Argued December 18, 1885 ; decided January 19, 1886.)

Reginald Hart for appellants.

E. P. Johnson for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

MARIA MERRITT et al., Respondents, *v.* THE VILLAGE OF PORT CHESTER et al., Appellants.

THIS case presented the same questions and was argued and decided with *Tingue v. Village of Port Chester* (*ante*, p. 294).

THE PEOPLE, Appellant, *v.* ARTHUR CIPPERLY, Respondent.

(Argued December 21, 1885 ; decided January 19, 1886.)

REPORTED below, 37 Hun, 324.

Decided on grounds stated in dissenting opinion of LEARNED, J., in court below.

D. Cady Herrick for appellant.

Eugene Burlingame for respondent.

Per Curiam mem. for reversal of judgment of General Term and for affirmance of judgment of Special Sessions.

All concur.

Judgment accordingly.

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Case 8

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Case 8

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LEON RHEINSTROM, Respondent, v. BERNARD MIDAS, Appellant.

(Argued December 22, 1885 ; decided January 19, 1886.)

Otto Horwitz for appellant.

Jeroloman & Arrowsmith for respondent.

Agree to dismiss appeal ; no opinion.

All concur

Appeal dismissed.

GEORGE STREAT, Respondent, v. V. HENRY ROTHSCHILD et al.,
Appellants.

(Argued December 22, 1885 ; decided January 19, 1886.)

Michael M. Forrest for appellants.

Wm. King Hall for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

HENRY CLEWS et al., Respondents, v. CORNELIUS REILLY,
Appellant.

(Argued December 22, 1885 ; decided January 19, 1886.)

Charles J. Patterson for appellant.

Royal S. Crane for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

WILLIAM SCHOLLE, Respondent, v. JACOB SCHOLLE et al., JOSEPH
McGUIRE, Purchaser, etc., Appellants.

(Submitted December 22, 1885; decided January 19, 1886.)

Weekes & Forster for appellants.

Alexander B. Johnson for respondent.

Agree to affirm on opinion of FREEDMAN, J., in court
below.

All concur.

Judgment affirmed.

In the Matter of the Application of the STATEN ISLAND RAPID
TRANSIT RAILROAD COMPANY to acquire title to lands, etc.

(Argued December 22, 1885; decided January 19, 1886.)

James McNamee for appellant.

Albert B. Boardman for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK v. THE KNIKER-
BOCKER LIFE INSURANCE COMPANY, ALBERT LEE HUNT,
Claimant, etc., Appellant.

(Submitted December 22, 1885; decided January 19, 1886.)

Raphael J. Moses, Jr., for appellant.

Edward H. Hobbs for receiver, respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

WILLIAM M. BAXTER, Respondent, v. ROBERT COLGATE et al.,
Appellants.

(Argued December 22, 1885 ; decided January 19, 1886.)

Nelson Smith for appellants.

J. Tracey Langan for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

CATHARINE J. WISE, Respondent, v. THE PHOENIX FIRE INSURANCE COMPANY OF HARTFORD CONNECTICUT, Appellant.

Where items of an account or claim are numerous, and therefore difficult to be retained in the memory, the court, in its discretion, may permit a witness to refer to memoranda, proved to be correct both as to items and value.

(Argued December 23, 1885 ; decided January 19, 1886.)

THIS action was upon a policy of fire insurance covering household furniture. Plaintiff was called as a witness in her own behalf to prove the loss ; she was allowed, as such witness, to refer to the schedule attached to the proofs of loss, for the purpose of refreshing her memory.

“There was no error in permitting the plaintiff, while under examination as a witness, to refer to the schedule attached to the proof of loss, for the purpose of refreshing her memory. (*Howard v. McDonough*, 77 N. Y. 592.) This schedule, which was made up a few days after the fire, was sworn to be correct both as to items and values, and to be made up from actual knowledge. Where the items are numerous, and, therefore, difficult to be retained in the memory, the court in its discretion may permit a reference to memoranda proven to be correct, both as to items and their values. To hold otherwise might make a party's rights dependent upon unusual strength of memory.”

Charles A. Fowler for appellant.

Howard Chipp, Jr., for respondent.

Per Curiam opinion for affirmance.

All concur.

Judgment affirmed.

THE PEOPLE, ex rel. THE NEW YORK AND HARLEM RAILROAD COMPANY, Respondent, v. THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW YORK, Appellant.

THE SAME, Respondents, v. THE SAME, Appellant.

THESE cases presented the same question and were argued and decided with *People, ex rel. v. Comm'rs* (*ante*, p. 322).

GEORGE W. LONG, Appellant, v. THE MILLERTON IRON COMPANY, Respondent.

(Argued December 23, 1885; decided January 26, 1886.)

THIS was an action to recover damages for the cutting and carrying away of certain timber. The parties had made a contract for the sale of standing timber on lands described in the contract. On the trial plaintiff offered to prove acts, statements and declarations of the parties at the time, and after the making of the contract, showing that the timber in question was not understood by the parties to be covered by the contract. This was objected to and excluded. *Held* no error; that the contract was clear and unambiguous, and reserved none of the timber, and that, therefore, oral evidence was inadmissible to change or to explain it.

James Lansing for appellant.

Ezek Cowen for respondent.

EARL, J., reads for affirmance.

All concur, except RAPALLO, ANDREWS and DANFORTH, JJ., dissenting.

Judgment affirmed.

JONAS PHILLIPS, Appellant, v. JOHN L. TAYLOR, Respondent.

(Argued December 9, 1885; decided January 26, 1886.)

DECIDED on the facts.

John E. Parsons for appellant.

John A. Mapes for respondent.

RAPALLO, J., reads for affirmance.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
THOMAS PHILLIPS et al., Respondents.

(Argued January 19, 1886; decided January 26, 1886.)

Edward W. Hatch for appellant.

Tracy C. Becker for respondents.

Appeal dismissed on argument.

JAMES E. OSTRANDER, Respondent, v. JOHN WEBER, Appel-
lant, ROBERT LOUGHREAN et al., Respondents.

(Argued January 19, 1886. decided January 26, 1886.)

S. L. Stebbins for appellant.

J. N. Fiero for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

101a 640
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JAMES G. ROSS, Appellant, *v.* SAMUEL P. WIGG, Appellant.
ALEXANDER R. CHRISTIE et al., Respondents, *v.* SAMUEL P.
WIGG, Appellant.

(Argued January 19, 1886; decided January 26, 1886.)

W. H. Kenyon for appellants.

W. A. Poucher for respondents.

Agree to affirm on opinion below.

All concur.

Order affirmed.

THE MANUFACTURERS AND TRADERS' BANK OF BUFFALO, Re-
spondent, *v.* HARRY H. KOCH, Appellant.

(Argued January 19, 1886; decided January 26, 1886.)

William F. Kip for appellant.

John G. Milburn for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

101c 640
162 864

THE PEOPLE, ex rel. ALFRED P. WRIGHT, Respondent, *v.* THE
COMMON COUNCIL OF THE CITY OF BUFFALO, Appellant.

(Argued January 19, 1886; decided January 26, 1886.)

Herman Hennig for appellant.

Ansley Wilcox for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

GEORGE H. BALL, Respondent, v. THE EVENING POST PUBLISHING COMPANY, Appellant.

(Argued January 19, 1886; decided January 26, 1886.)

John G. Milburn for appellant.

Frank C. Ferguson for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

CHARLES W. DURANT, JR., Respondent, v. WILLIAM P. ABENDROTH, Impleaded, etc., Appellant.

ABRAHAM VAN DOLAN, Respondent, v. THE SAME, Appellant.

(Argued January 19, 1886; decided January 26, 1886.)

Wm. Henry Arnoux for appellant.

Carlisle Norwood, Jr., for respondent.

Agree to affirm; no opinion.

All concur.

Orders affirmed.

DANIEL ACKERMAN et al., Appellants, v. CHARLES C. DE LUDE, Respondent.

(Argued January 19, 1886; decided January 26, 1886.)

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

WILLIAM C. VEGHT, Administrator, etc., Respondent, v. FLORENCE SLOCUM et al., Appellants.

(Argued January 19, 1886 ; decided January 26, 1886.)

Wm. B. Slocum for motion.

Andrew Fallon opposed.

Motion to dismiss appeal granted unless within twenty days from order, the appellant furnishes the undertakings required by law, with \$10 costs.

All concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. EDWARD SEELEY, Appellant.

(Argued January 18, 1886; decided February 2, 1886.)

W. Henry Davis for appellant.

W. H. Shaffer for respondent.

Agree to affirm ; no opinion..

All concur.

Judgment affirmed.

THOMAS MALONEY, Appellant, v. THE BROOKLYN CITY RAILROAD COMPANY, Respondent.

(Argued January 18, 1886; decided February 2, 1886.)

Charles J. Patterson for appellant.

Winchester Britton for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ALDEN B. STOCKWELL, Appellant, v. JOSEPH RICHARDSON, Respondent.

(Argued December 14, 1886; decided February 9, 1886.)

Samuel Hand for appellant.

Aaron J. Vanderpoel for respondent.

Agree to affirm on opinion below.

DANFORTH, EARL and FINCH, JJ., dissenting.

Judgment affirmed.

ORVILLE DINGEE, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Submitted January 19, 1886; decided February 9, 1886.)

Close & Robertson for appellant.

A. J. Adams for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN FAY et al., Respondents, v. JOHN T. LYNCH, Impleaded, etc., Appellant.

(Argued January 19, 1886; decided February 9, 1886.)

W. F. Dunning for appellant.

John W. Weed for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

E. L. DOUGHTY et al., Respondents, v. THE MANHATTAN BRASS
COMPANY, Appellant.

(Argued January 20, 1886; decided February 9, 1886.)

THIS was an action to recover damages for an alleged breach of a contract for the sale of a quantity of hoop-brass.

The following is the opinion :

“The contract upon which the plaintiffs rely is contained in letters written by one or the other party, and the only question upon this appeal is whether their true construction discloses an agreement valid under the statute of frauds. (2 R. S., tit. 2, p. 2, chap. 7, § 3, subd. 1.) The appellant’s contention is that ‘the contract relied upon is not contained in any note or memorandum subscribed by the defendant,’ and as I understand the argument, it rests mainly upon the assumption that the only reference to price is contained in a postscript to the defendant’s letter of September 12, 1879, and that this postscript is not subscribed.

“The defendant was a maker of brass hoops, and the plaintiffs, as manufacturers of cedar ware, required that article. Business relations had existed between them for several years, and on the 12th of September, 1879, the defendant wrote concerning certain orders already received, giving some general information relating to the present and probable future price of brass, and duly subscribed the same. Below the signature were these words: ‘P. S. Will make price for November and December 17c. lb.’ It is plain that the signature was intended to authenticate the paper, and in such case it is immaterial upon what part it is placed, whether at the beginning or the end, or in the middle. The postscript was an afterthought, but it was verified as effectually for the purposes of correspondence as if written in the body of the letter to which it was added, and into which by reference it may be deemed incorporated. In response to this letter, the plaintiffs, under date of September 15, 1879, gave a written order signed by them for ‘two tons of eleven-sixteenths hoop brass November 1, two tons December 1,’ and under date of September seventeenth the

defendant wrote: 'Your order for November and December to hand and booked.'

"In another written communication dated October 6, 1879, and sent to and received by the plaintiffs, the defendant said: 'We will not fail to ship one thousand pounds per week or more until your order is filled.' These writings were subscribed by the defendant. If the letter of September twelfth stood alone as containing the contract, it would be necessary to hold that it was not subscribed within the intent of the statute (*James v. Patten*, 6 N. Y. 9); but all the letters above referred to are so connected by their contents as together to constitute a note or memorandum for the sale of four tons of hoop brass at seventeen cents per pound, to be delivered one-half November first, and the other half December first. The proposal and final acceptance import a consent of both parties, and create an obligation on the part of the plaintiffs to take and pay for the same, as delivered. It is said, however, by the learned counsel for the appellant that the order of September fifteenth was indefinite, because it did not specify the required thickness of the hoop, nor a stipulated time of payment. It is apparent, however, that earlier orders had been given and in part filled, and the one in question called for the same article but at a different price. If otherwise, however, there was neither ambiguity in the contract nor any difficulty in performing it according to its terms. No term of credit was bargained for, and although the complaint alleges that by the agreement payment was to be made on the first of the month after the goods were received, that allegation was not proved, and the question presented was simply one of variance between the complaint and proof which the trial court might properly disregard. We think the note or memorandum sufficient to express a contract. The verdict of the jury, upon evidence sufficient for their consideration, establishes the breach of that contract by the defendant and damages incurred by the plaintiffs in consequence of it.

"We find no error, therefore, in the judgment appealed from and think it should be affirmed."

S. B. Brownell for appellant.

E. More, Jr., for respondents.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

CORNELIUS FITZPATRICK, Respondent, *v.* THE FORTY-SECOND STREET AND GRAND STREET RAILROAD COMPANY, Appellant.

(Argued January 20, 1886; decided February 9, 1886.)

Freling H. Smith for appellant.

P. Mitchell for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

EDWARD W. MCGINNIS et al., Appellants, *v.* HENRY SMYTHE, Respondent.

(Argued January 22, 1886; decided February 9, 1886.)

DECIDED on the facts.

Norman Melliss for appellants.

E. More for respondent.

EARL, J., reads for affirmance.

All concur, except RUGER, Ch. J., dissenting, and RAPALLO, J., not voting.

Judgment affirmed.

FRANCIS B. BREWER, Respondent, *v.* THE UNION PACIFIC
RAILROAD COMPANY, Appellant.

(Argued January 22, 1886; decided February 9, 1886.)

Artemus H. Holmes for appellant.

B. F. Watson for respondent.

Agree to affirm on report of referee.

All concur, except DANFORTH, J., not voting.

Judgment affirmed.

JULIET R. LOOKWOOD, Appellant, *v.* WILLIAM M. HOUSE, Re-
spondent.

(Argued January 22, 1886; decided February 9, 1886.)

THE nature of the action is shown in the following extract from the opinion :

“ This action was brought to recover possession of an executed deed which had vested title in the plaintiff, but remained unrecorded in the hands of the defendant, to whom it had been intrusted for safe-keeping. The complaint alleges the execution and delivery of the deed in controversy and plaintiff's ownership of the land described in it; the deposit of the instrument with defendant for safe-keeping merely; a demand of its return and a refusal to surrender; that it remained unrecorded; and that, in doubt of the defendant's responsibility, harm might result from a possible conveyance by him. The relief asked was to recover possession of the deed; for damages resulting from the detention; and an injunction restraining a conveyance. It will be observed that the action goes on the assumption that the defendant had actually executed and delivered the deed, so that, by force of it, title had passed to the plaintiff, and the action is nothing else than an effort to recover possession of a muniment of title withheld by a mere bailee. It is impossible to turn such an action into one to compel a convey-

ance, or for the specific performance of an agreement to convey. Not only does the pleading fail to set out any such agreement and consequent duty, but what it does allege is utterly inconsistent with any such theory, for it asserts that the conveyance had been already made, and the duty, if any, fully performed. The plaintiff's proof corresponded with the pleading."

Defendant's proof, however, was to the effect that the deed was never delivered, but that it was to be held by him until certain payments were made, and upon this issue of fact the finding was for the defendant. The court here say that this finding was conclusive of the action, and that any further question as to whether defendant ought to have conveyed or could be compelled in equity to convey was not in the case.

Austen G. Fox for appellant.

N. Quackenbos for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

In the Matter of the Petition of **ULRICH MAURER** for the
Custody of **WILLIAM MAURER**, an Infant.

(Argued January 27, 1886; decided February 9, 1886.)

M. L. Towns for appellant.

Stephen S. Jacobs for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

WILLIAM ALLENDORPH, Respondent, v. JOHN A. WHEELER,
Impleaded, etc., Appellant.

(Argued January 25, 1886 ; decided February 9, 1886.)

THE questions presented in this case were as to the reception and rejection of evidence ; they were disposed of principally in view of the facts.

George P. Lawton for appellant.

James Lansing for respondent.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

LOUIS CASPER, Respondent, v. EDWIN WALLACE et al., Ap-
pellants.

(Submitted January 25, 1886 ; decided February 9, 1886.)

Blumenstiel & Hirsch for appellants.

Stern & Myers for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

WILLIAM H. CATLIN, Respondent, v. ALEMBERT POND et al.,
Appellants.

(Argued January 26, 1886 ; decided February 9, 1886.)

THIS was an action for false imprisonment.

SICKELS — VOL. LVI.

82

Plaintiff was arrested upon an execution against the person, issued by defendants Pond & French, as attorneys for the other defendant. The execution was vacated as having been illegally issued.

The following is the *mem.* of opinion :

"The court charged the jury that there was no proof of malice justifying them in giving one cent beyond the actual damage sustained by the plaintiff; and that the evidence upon which they were to base their verdict was that the plaintiff was under arrest four hours under a mistaken claim of right, and what is a fair compensation for that they were to give him and no more. That the right to compensation was made up of the loss of time and the insult and humiliation that was put upon him by the arrest. That is a part of the actual damage the plaintiff is entitled to, and must be fixed by the jury.

"The defendants excepted to that portion of the charge relating to the subject of insult and humiliation.

"The jury found for the plaintiff in the sum of \$2,500 damages.

"Assuming that they had the right to award damages for the insult and humiliation to which the plaintiff was subjected, it was still their exclusive right and province to determine whether the plaintiff had or had not suffered these injuries. It seems to us that the charge of the court is fairly subject to the criticism that it asserted in unqualified and imperative terms the existence of these elements of damages and quite imperatively required the jury to make an assessment upon that account.

"The question of fact as to whether there was such insult and humiliation or not was practically withdrawn from the consideration of the jury and determined by the court. Under this charge it was quite possible that they supposed they were not at liberty to find that insult and humiliation did not exist, and yet, upon the evidence in the case, it seems to us that they might properly have determined that question either way without justifiable censure.

"We think, not only that the charge was liable to be misconstrued by the jury, but that the amount of the verdict ren-

ders it quite probable that they were misled in this respect by the charge.

"The opinion of the learned judge writing at General Term seems to indicate that the court were of opinion that the damages awarded by the jury were excessive, but for some unexplained reason they still affirmed the judgment.

"Although we might be of the opinion that the General Term erred in refusing to grant a new trial upon the ground of excessive damages, we are not at liberty to review the order affirming the judgment for that reason; but in seeking the cause for a result which seems so inconsistent with the circumstances and justice of the case, we cannot overlook the disapprobation of the verdict expressed in the opinion below.

"The judgment should, therefore, be reversed and a new trial ordered, costs to abide event."

Samuel Hand and Edgar T. Brackett for appellants.

Marshall P. Stafford for respondent.

Per Curiam mem. for reversal and new trial.

All concur.

Judgment reversed.

THE PEOPLE, ex rel. ADON SMITH, JR., as Committee, etc., v.

THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK et al., Respondents.

The provision of the act of 1880 (§ 6, chap. 269, Laws of 1880) providing for the review and correction of assessments, which declares that costs shall not be awarded against assessors whose proceedings may be reviewed under the act, only relieves the assessors from costs upon the hearing at Special Term. Costs of appeal are to be given or withheld in the discretion of the court. (Code of Civ. Pro., § 8339.)

(Argued February 2, 1886; decided February 9, 1886.)

THIS was a motion to amend the remittitur herein so far as it awarded costs against the respondents.

The case is reported in 100 N. Y. 219.

The following is the *mem.* of opinion :

"We think the statute now referred to by the respondents (Laws of 1880, chap. 269, § 6) only relieves the assessors from costs upon the hearing at Special Term, on return to the *certiorari*. An appeal from the determination there made is a different matter, subsequently provided for, and directed to be heard and determined in like manner as an appeal from an order. (Laws of 1880, *supra*, § 7.) In such a case costs are to be given or withheld in the discretion of the court (Code, § 3239), and they were so awarded.

"The motion to amend the remittitur is, therefore, denied, with costs."

D. J. Dean for motion.

William Man opposed.

Per Curiam mem. for denial of motion.

All concur.

Motion denied.

PETER BOWE, as Sheriff et al., Appellants, v. JOHN H. V. ARNOLD, Individually, and as Assignee, etc., et al., Respondents.

(Argued January 27, 1886; decided February 12, 1886.)

Walter Howe for appellants.

John H. V. Arnold for respondents.

Agree to affirm on opinion of DANIELS, J., in court below.

All concur.

Judgment affirmed.

LETTIEA HOSFORD, Respondent, v. FREDERICK KELSEY, Appellant.

(Argued January 27, 1886; decided February 12, 1886.)

M. L. Towns for appellant.

James J. Rogers for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JAMES TALCOTT, Appellant, v. WALTER S. PIERCE et al.,
Respondents.

(Argued January 27, 1886; decided February 12, 1886.)

William P. Chambers for appellant.

John E. Parsons for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

AMBROSE S. CASSIDY, Respondent, v. ROBERT JENKINS, Appellant.

(Argued February 1, 1886; decided February 12, 1886.)

George H. Yeaman for appellant.

Rastus S. Ransom for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ELIZABETH A. L. HYATT, Appellant, v. GEORGE W. TICE,
et al., Respondents.

(Argued February 1, 1896; decided February 12, 1896.)

George W. Van Slyck for appellant.

George H. Yeaman for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

CLARISSA DALE, Respondent, v. DAVID MAIN, Appellant.

(Argued February 1, 1896; decided February 12, 1896.)

C. P. Hoffman for appellant.

Quentin McAdam for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ALFRED T. BAXTER, Respondent, v. ISAAC N. HEBBERD, In-
dividually, and as Assignee, etc., Appellant.

(Argued February 2, 1896; decided February 12, 1896.)

Winchester Britton for appellant.

Frederic A. Ward for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

DANIEL S. GARDNER, Respondent, v. EDWIN R. MEADE,
Appellant.

(Argued February 2, 1886; decided February 12, 1886.)

George W. Miller for appellant.

Edmund A. Conner for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

In the Matter of the Examination of the Books of the
SURROGATE OF WESTCHESTER COUNTY.

(Argued February 2, 1886 ; decided February 12, 1886.)

Calvin Frost for appellant.

Wilson Brown, Jr., for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

JULIA E. BLACKMAN, Respondent, v. ELIZA WHEELER, Ap-
pellant.

SAME, Respondent, v. SAME, Appellant.

SAME, Respondent, v. SAME, Appellant.

(Argued February 2, 1886 ; decided February 12, 1886.)

A. B. Conger for appellant.

Myron G. Bronner for respondent.

Agree to dismiss appeals ; no opinion.

All concur.

Appeals dismissed.

MORRIS NEWMAN, Appellant, v. GEORGE A. REYNOLDS, Respondent.

(Argued February 2, 1886; decided February 12, 1886.)

P. J. Joachimsen for appellant.

Benno Loewy for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

JOHN V. RECTOR, Appellant, v. RIDGEWOOD ICE COMPANY, Respondent.

(Argued February 2, 1886; decided February 12, 1886.)

S. W. Rosendale for appellant.

Nathaniel C. Moak for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

NICHOLAS ALBERT et al., Respondents, v. ALBERT BACK et al., Appellants.

(Argued February 2, 1886; decided February 12, 1886.)

A. Blumenstiel for appellants.

S. F. Kneeland for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THOMAS E. JOYCE, Respondent, *v.* ELIZABETH F. SPAFARD,
Appellant.

(Argued February 2, 1886; decided February 12, 1886.)

F. G. Fincke for appellant.

Wm. E. Harter for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

DAVIS W. SHULER, Respondent, *v.* MARGARET L. MAXWELL et
al., Appellants.

(Argued February 2, 1886; decided February 12, 1886.)

Edward J. Maxwell for appellants.

M. L. Stover for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

BUFFALO LUBRICATING OIL COMPANY, Limited, Respondent, *v.*
THE STANDARD OIL COMPANY OF NEW YORK et al., Appel-
lants.

(Argued February 2, 1886; decided February 12, 1886.)

Thomas G. Outerbridge for appellants.

Adelbert Moot for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

CLARA B. ALLEN, Appellant, v. WALTER S. ALLEN, Respondent.

In a civil action the fact of adultery may be established by proof of such facts and circumstances, as, under the rules of evidence, are competent to be proved, and which satisfy the mind of the tribunal required to pass upon the question of the truth of the charge. It is not necessary to satisfy the mind beyond a doubt, or to lead the judgment as a necessary conclusion to the determination that adultery has been actually committed.

No different standard of judgment applies to such a case from that which in ordinary transactions guides the conclusions of intelligent and conscientious men.

(Argued January 28, 1886 ; decided March 2, 1886.)

THIS was an appeal from an order of General Term reversing a judgment in favor of plaintiff and granting a new trial.

The action was by a wife against her husband for a separation on the ground of cruel and inhuman treatment. The answer set up a cause of action against the plaintiff, and claimed judgment for an absolute divorce on the ground of adultery, as authorized by section 1770 of the Code of Civil Procedure.

The court here, after a consideration of the evidence, concurred with the General Term that the evidence was sufficient to sustain the answer. The following is an extract from the opinion :

"The referee, in his formal findings, found that the evidence did not establish the adultery charged. He states, in his opinion, that it failed to satisfy his mind beyond doubt that the intercourse between the plaintiff and Gove was criminal; that while the evidence to sustain a charge of adultery must, in most cases, be largely circumstantial, yet the circumstances must be such as to satisfy the mind of the actual fact of adultery, and 'must lead the judgment not only by fair inference, but as a necessary conclusion, to the determination that adultery has been actually committed.' We do not understand this to be the true rule, although it has support in the language of this court in *Pollock v. Pollock* (71 N. Y. 137), which, however, was unnecessary to sustain the judgment in that case. The expression in *Pollock v. Pollock* was probably founded

upon the language of Sir William Scott, in his opinion in the leading case of *Lovenden v. Lovenden* (1 Hagg. Cons. 1), in which after stating as a fundamental rule, that it is not necessary to prove the actual fact of adultery, proceeded: 'In every case almost the fact is inferred from circumstances that lead to it by fair inference, as a necessary conclusion.' It is clear that Sir William Scott did not mean that adultery could only be established by circumstances from which no other possible conclusion could be drawn, for it is seldom that circumstantial evidence is of such a character that another inference than that to which the circumstances naturally lead cannot be suggested or is inconceivable. In another part of his opinion, the learned judge declares more fully the rule in respect to circumstantial evidence: 'The only general rule,' he says, 'that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man.' It is plain from this language, that the learned judge did not, in the former part of his opinion, intend to lay down the rule that the fact of adultery could not be found upon circumstantial evidence, unless the circumstances admitted of no other possible conclusion.

"We understand the rule to be, that in a civil action, the fact of adultery may be proved by such facts and circumstances, as under the rules of law, are legal evidence, admissible in a court of justice, which clearly satisfy the mind of the tribunal which is required to pass upon the question of the commission of the act. In weighing the evidence and considering the facts and circumstances, great care is necessary, on the one hand, not to be misled by circumstances reasonably capable of two interpretations, into giving them an evil rather than an innocent one, nor, on the other, by refusing to give them their plain and natural significance on the theory that a different standard of judgment applies to such cases, from that which in ordinary

transactions guides the conclusions of intelligent and conscientious men. The circumstances must be considered separately, and also as a whole. The single threads of circumstance may be weak, but united, they often lead, with assured conviction, to the final fact which is the subject of the investigation. (*Williams v. Williams*, 1 Hagg. Cons. 299; *Durant v. Durant*, 1 Hagg. Ecc. 748; 2 Greenl. Ev., §§ 40, 41.)"

Matthew Hale for appellant.

Arthur L. Andrews for respondent.

ANDREWS, J., reads for affirmance of order, and for judgment absolute on stipulation.

All concur.

Order affirmed and judgment accordingly.

HENEY KNIGHT et al., Respondents, *v.* THE NEW YORK AND MANHATTAN BEACH RAILWAY COMPANY, Impleaded, etc., Appellant.

(Argued February 8, 1886; decided March 2, 1886.)

Samuel E. Brown for appellant.

Lewis J. Morrison for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ALICE LAKE, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Submitted February 8, 1886; decided March 2, 1886.)

James F. Gluck for appellant.

William C. Watson for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. .

ERASTUS B. SEARLES, Respondent, *v.* MANHATTAN RAILWAY
COMPANY, Appellant.

It seems that where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause ; if under the testimony it is just as probable that it was caused by the one as the other, he cannot recover.

(Argued February 8, 1886 ; decided March 2, 1886.)

THIS action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

Plaintiff was riding upon a car on the street under defendant's elevated road, in the city of New York, when a hot cinder fell from a locomotive passing overhead, and struck him in the eye.

The following is the *mem.* of opinion :

"There was sufficient evidence to show that the plaintiff's eye was injured by a cinder lodged therein ; that the cinder came from a locomotive upon defendant's railway, and that the plaintiff was free from contributory negligence. But there was an utter failure of evidence to show that the accident occurred from any fault, negligence or unskillfulness on the part of the defendant. The defendant had the right to operate its railway over the street by steam, and to generate steam by the use of coal, and any damage necessarily caused by the careful and skillful exercise of its lawful rights could impose no obligation upon it. To maintain his action, therefore, the plaintiff was bound to give evidence legitimately tending to show that the

101	661
133	660
101	661
140	819
101	661
154	95
101	661
158	101
101	661
169	267
101	661
171	*155

damage to his eye was caused in consequence of some negligence or unskillfulness chargeable to the defendant.

"The undisputed evidence shows that all the appliances used upon defendant's locomotives to prevent the escape of sparks and cinders were skillfully made and were the best known. There was no evidence that any of such appliances were defective or out of order. On the contrary, the proof tended to show that they were in order. The mere proof of the escape of cinders was not sufficient, as the evidence showed that their escape could not be avoided and was inevitable. According to the proof cinders from one of defendant's locomotives could come only from the smoke-stack or ash-pan. There is no claim that the defendant is liable for this accident if the cinder came from the smoke-stack ; but the claim is that it came from the ash-pan because it was out of repair. But there was no evidence that the ash-pan was out of repair, or that the cinder came from it. When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must fail also if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the negligence and unskillfulness of the defendant is not sufficient.

"The judgment should, therefore, be reversed, and a new trial ordered, costs to abide event."

Edward S. Rapallo for appellant.

Lewis J. Morrison for respondent.

EARL, J., reads for reversal and new trial.

All concur, except DANFORTH, J., dissenting, and RAPALLO, J., taking no part.

Judgment reversed.

HENRY NEWMAN, Respondent, v. EMIL GREEFF et al., Appellants.

101	668
165	419

(Submitted February 3, 1886; decided March 2, 1886.)

THIS was an action to recover damages for alleged breach of a contract for the sale and delivery by defendants to plaintiff of a quantity of buttons.

The defense was based principally upon the ground that the contract was made by defendants as agents for third parties, not as principals. The contract was embodied in letters written by defendants acknowledging and stating the particulars of verbal orders received from plaintiff. The counsel submitted the question on what the court here considered sufficient evidence to the jury. The following is an extract from the opinion :

“ Upon this appeal the counsel for the appellants assumes that the defendants were commission merchants and agents for manufacturers, and in the light of that knowledge and the language of the letters, contends that the character of the transaction was one of agency merely. What the plaintiff knew was, under the testimony, for the jury to say, and we are unable to find in the letters any conclusive evidence showing that the defendants intended to act otherwise than as principals. In the first place they sign as principals. Then they say “ we report your order,” and this, in view of the fact testified to, that the plaintiff had given the order verbally, and Chapman had made a memorandum of the articles and prices, may mean ‘ report the order ’ for the information of the plaintiff, as in *Brigg v. Hilton* (99 N. Y. 517), they add, ‘ goods to be put up in bulk ; delivery as soon as possible.’ Thus the contract imports a personal obligation.

“ The cases cited by the appellant do not require a different conclusion. In *Cobb v. Knapp* (71 N. Y. 348), the agent disclosed no principal, and was held liable. In *Southwell v. Bowditch* (Law Rep., 1 C. P. Div. 100, on appeal, 374), it was plain on the face of the writing that the defendant was not acting for himself, but for ‘ principals,’ that phrase qualifying the contract. In *Metcalf v. Williams* (104 U. S. 93), the defend-

ant was sued personally upon a check signed by him, with the addition of 'V. Pres't,' his name of office, and it was held that he was not personally liable. In each there was enough on the face of the papers to indicate that the person signing acted as agent, and it appeared that the one with whom he dealt had knowledge of that agency.

"In the case before us the signature is the firm name of the defendants, and whether the words used in the bodies of the letters are susceptible of an interpretation which would indicate a different relation to the contract on the part of the signers, is at most ambiguous. Evidence was, therefore, admissible and was received, to fix its true character. And the jury have found as a fact that the defendants did act, and were understood by the plaintiff to act in the transaction as principals, and not as agents. No exception was taken to the judge's charge under which they found their verdict, and it must be deemed conclusive."

W. Z. Larned for appellants.

Stern & Myers for respondent.

Agree to affirm; opinion by DANFORTH, J.

All concur.

Judgment affirmed.

EDWARD KELLY et al., Appellants, v. FRANCES A. GEER, Respondent.

(Argued February 8, 1886; decided March 2, 1886.)

THIS action was upon a covenant in a deed from plaintiff to defendant, who was a married woman, and her son, Harvey M. Geer; it was embodied in the *habendum* clause in the deed, of which the following is a copy:

"To have and to hold the above granted premises unto the said Frances A. Geer, for and during the minority of her son, Harvey M. Geer, and until the said Harvey M. Geer shall ar-

rive at the age of twenty-one years, and unto the said Harvey M. Geer, and his heirs, to his and their own use in case he shall arrive at the full age of twenty-one, but in case the said Harvey M. Geer shall decease before he arrives at the age of twenty-one years, then unto the said Frances A. Geer and her heirs and assigns, to their own use forever, subject, nevertheless, to a mortgage made by the parties of the first part, to Alfred B. Nash, for the sum of \$3,500, which the party of the second part assumes and agrees to pay as part of the consideration money."

The defendant, after her son became of age, joined with him in a deed of the land to one Murphy.

The following is the *mem.* of opinion :

"The only asserted basis of defendant's liability upon the assumption clause in the deed is the fact of her joining at a later period in a conveyance of the property to Murphy. It is abundantly proved that her husband, without authority from her, and without her knowledge, took the deed in her name as grantee with a covenant contained in it to pay the outstanding incumbrance. Her liability could only spring from an acceptance of that deed, evincing her consent to an adoption of the covenant contained in it; but the finding is that she never accepted the deed and had no knowledge of its existence until at least the date of the deed to Murphy, and at that date had no knowledge of the contents of the conveyance to her. The proof of these facts is made more probable by the further fact that the real grantee was her son, who advanced the purchase-money, but, being a minor at the time, assented to the arrangement which joined his mother with him as grantee, but limited her title to his minority. It is easy to see how this might have been done without authority or knowledge of the defendant, since the real aim of the transaction was a purchase by the son and for his own use. He reaped the entire benefit of the transaction, as it was undoubtedly intended that he should; collected and received all the rents and profits; and at his majority became sole and absolute owner. Outside of the one act of the defendant in joining with her son in his conveyance to Murphy, she was entirely free from any act or word of assent

which could make the unauthorized covenant her own. Her signature to that conveyance is thus the sole fact upon which the liability asserted can be based. That cannot affect her upon the ground of ratification, for the proof shows her entire ignorance of the contents of the deed to her, or the existence of any covenant whatever. It is argued that when asked to join with her son in the deed to Murphy she must have known that some title or right was supposed to have been vested in her, and so she must have inferred the existence of a deed to her. That may be, but was hardly a necessary inference which we ought to say she must have drawn; and at all events the inference falls short of any conscious ratification of a covenant of which he had no knowledge, and which as an element of her action or a subject for her consideration did not exist. This view of the case is met by the appellant's contention that she was bound to know and so must be charged with knowledge upon the principle that one cannot take the benefit of a contract and at the same time repudiate it and the agency by which it was effected. But the defendant took no benefit from the contract. She received none of its fruits. She had no title of any sort when she joined in the deed to Murphy; received nothing for her signature which was needless; and simply quit-claimed a right which she did not have for the satisfaction of the purchaser. She stood, on that day, a total stranger to the title. If she had then been informed that she was named as grantee in the deed to her son, and that it contained a covenant to pay the outstanding mortgage, she could have done no more than barely to repudiate the unauthorized covenant. She could not have conveyed back to the vendors, for time had vested the complete and absolute title in her son, and she had nothing to convey. She could return nothing to the vendors and could take nothing from them, by joining in the deed to Murphy. That act neither benefited her nor harmed her vendors, and was purely formal, without practical consequences in either direction. We think it was properly held that she incurred no liability.

"The judgment should be affirmed, with costs."

Charles E. Patterson for appellants.

Henry A. Merritt for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

ELIZA ALLISON, Appellant, v. THE VILLAGE OF MIDDLETOWN,
Respondent.

(Argued February 4, 1886 ; decided March 2, 1886.)

THIS action was brought to recover damages for injuries sustained by plaintiff, alleged to have been caused by defendant's negligence in permitting ice to accumulate on a sidewalk of one of its streets whereon plaintiff stepped, slipped, fell and was injured. 101 667
j171 605

The plaintiff was nonsuited on the trial.

The following is the *mem.* of the opinion :

" We think the case should have gone to the jury. It is claimed that the proof shows that the plaintiff was not on the sidewalk when she slipped, but was on the open space adjacent, in front of the house, over which she was passing to reach the walk. The most that can be said in support of this contention is that on her re-examination the plaintiff stated that the place where she fell was about three or four feet from the steps of the house, and the evidence shows that it was five feet or more from the steps to the inner line of the sidewalk. But on the same re-examination she also testified that the place of the accident was four or five feet from the curb. Both statements could not be true. The walk was seven feet wide, and if the plaintiff fell within five feet of the curb, she must have been upon the sidewalk at the time. Her testimony on her original examination was distinct that she slipped and fell on the sidewalk. Her subsequent evidence, taken together, was not necessarily inconsistent with her former testimony. It was for the jury to determine, upon her whole evidence, whether she was upon the walk, or outside of it, at the time of the accident.

"There was also sufficient evidence to go to the jury upon the question of the defendant's negligence. The jury would have been justified in finding that the village had negligently allowed the ice, formed from the wastage of the pump and the discharge from the leader on the house, to accumulate and remain, rendering the walk unsafe. The jury was the appropriate tribunal to determine the case, and the nonsuit was, we think, improperly granted."

T. A. Read for appellant.

W. F. O'Neill for respondent.

ANDREWS, J., reads for a reversal, and new trial.

All concur.

Judgment reversed.

EDWARD D. MCCARTHY, Respondent, *v.* ROBERT BONYNGE,
Appellant.

(Argued February 4, 1886; decided March 2, 1886.)

Thomas Allison for appellant.

La Roy S. Gove for respondent.

Agree to affirm, on opinion of DALY, Ch. J., in court below.

All concur.

Judgment affirmed.

DAVID C. CARLETON, Appellant, *v.* THE MAYOR, ALDERMEN
AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Argued February 5, 1886; decided March 2, 1886.)

H. B. Philbrook for appellant.

E. Henry Lacombe for respondent.

Judgment affirmed by default.

DAVID GRIFFIN, Respondent, v. GEORGE K. OTIS, Appellant.

(Submitted February 6, 1886 ; decided March 2, 1886.)

Archibald S. Sessions for appellant.

Samuel E. Fairfield for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

CHARLES S. GRIFFIN, Respondent, v. CORNELIA C. GRAY et al., Appellants.

(Argued February 5, 1886 ; decided March 2, 1886.)

J. W. Rayhill for appellants.

C. D. Prescott for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

MARY PRICE et al., Respondents, v. SEPTIMUS BROWN et al., Appellants.

101c 630
148 527

A person cannot acquire title to land, which is uninclosed, unoccupied and unimproved, by taking a deed thereof from one not the owner and then going upon the land and asserting his ownership, or making occasional entries upon the land for grass or sand.

(Submitted February 6, 1886 ; decided March 2, 1886.)

THE nature of this action, and the material facts are stated in the opinion, which is given in full :

“ This action was brought to recover damages for a trespass alleged to have been committed by the defendants upon land. The plaintiffs claimed title to the land, and the defendants

claimed that the land was owned by Louisa A. Carll, and justified their acts under her.

"In order to maintain their action it was incumbent upon the plaintiffs either to prove a good paper title to the land or the possession thereof which was wrongfully invaded by the defendants.

"The land was a piece of inclosed sandy beach upon Long Island Sound, and the title thereof seems to have been in dispute for many years. The plaintiffs attempted to prove their paper title as follows: A deed from Platt Scidmore to his children Hannah A. Scidmore and Brewster P. Scidmore, dated September 17, 1818, conveying a piece of land described as follows: 'Piece or parcel of salt or sedge meadow lying and being in Crab meadow, bounded on the west by the beach or sound; on the east by the meadow of Joel Scidmore; on the south and west by the creek, containing six acres;' deed from Brewster Scidmore and Abigail his wife, to Henry Ketcham, dated April 21, 1835, conveying the same land by the same description; deed from Henry Ketcham and his wife, formerly Hannah A. Scidmore, to Lewis Ketcham dated May 31, 1852, conveying the same piece of land by the same description except that it is bounded north instead of west by 'the beach or sound;' will of Lewis Ketcham dated May 7, 1870, in which he devised to John E. Hudson land as follows: 'A piece of meadow lying at Crab meadow which I bought of Henry Ketcham containing six acres, bounded on the east by the meadow of the late Joel Scidmore, on the south and west by the creek and on the north by the beach or sound;' will of John E. Hudson dated November 17, 1880, in which he devised land to the plaintiffs as follows: 'The tract of meadow and sand situated at Crab meadow and devised to me by the last will and testament of Lewis Ketcham, deceased.' There is no certainty that the land described in these deeds and wills is the same land described in the complaint as follows: 'North by Long Island Sound, east by land of Scidmore or Ann M. Parrot, the eastern boundary being a straight line from the sound to the creek, on the south and south and west by Crab meadow creek.' It does not appear that Platt Scidmore had any title

to the land or that he held any conveyance thereof, or that he or Brewster P. Scidmore ever possessed the same, or performed any acts of ownership thereon, or exercised any dominion whatever over the same; and it does not appear that this barren sand beach was in the actual possession of any of the grantors named in the deeds put in evidence by the plaintiffs at the times of the execution of such deeds, or that it was in the possession of the persons who executed the wills at the times of the execution of such wills or the deaths of the devisors. The plaintiffs' paper title therefore utterly fails, and it remains only to be inquired whether upon the evidence they had such a title founded upon possession as enabled them to maintain this action against the defendants.

"Henry Ketcham received his deed of the land in 1835 and executed the deed to Lewis Ketcham in 1852, and during all that long period all he is proved to have done upon the land was to dry some grass thereon a number of times which he had cut upon the Crab meadow. Lewis Ketcham, who took his deed in 1852, and died more than twenty years thereafter, performed about the same acts upon the land. Some of the grass dried upon the beach by Lewis and Henry Ketcham may have been cut upon the beach, about a half acre of poor grass being cut each year for several years, and the whole process of cutting and drying taking but a short time in each year. Subsequently Hudson and the plaintiffs took and sold some sand from the beach on several occasions. From time to time the Ketchams, Hudson and the plaintiffs asserted their title to the lands, which, however, was disputed.

"I have now given all the acts of dominion and ownership which the plaintiffs and those under whom they hold exercised over the land. They never inclosed, cultivated or improved the land in any way, and never had, so far as appears, the actual possession of the place where the alleged trespass was committed. A person cannot acquire title to an uninclosed, unoccupied, unimproved parcel of land by taking a deed thereof from one not the owner, and then merely going upon the land and there asserting his ownership; nor can he acquire the title by taking such a deed and then making an occasional foray

upon the land for grass or sand, and thus committing trespass against the real owner. (*Miller v. L. I. R. R. Co.*, 71 N. Y. 380.)

"We think the defendants gave evidence of their title full as significant as that given by the plaintiffs of their title. As to their paper title it was as follows: Deed from Zopher Scidmore to Nathaniel Scidmore, dated August 30, 1815, conveying land described as follows: 'On the south by Augustine Fleete's meadow, on the east by the highway that leads to the landing; on the north by the sound, and to run west as far as to include all my right between the east boundary line and Crab meadow gut or inlet.' It does not appear that the grantor owned the land described or that he ever possessed the same. The grantee died intestate December 28, 1847, and his heirs, by a deed dated February 1, 1869, conveyed the same land to Louisa A. Carll, under whom the defendants justified. Nathaniel Scidmore claimed to own the beach, and exercised various acts of ownership thereon. He collected and sold paving stones therefrom, cut wood and pastured his cattle thereon, and took, removed and gave permission to others to take seaweed therefrom; and once he sued a person for cutting wood thereon. It does not appear that after his death his heirs did any thing upon the beach prior to their conveyance to Mrs. Carll. All this evidence failed to show any title or possession in Mrs. Carll which would enable her to sue any one for trespass upon this beach.

"We are, therefore, of opinion that the plaintiffs should have been nonsuited and that the judgment should be reversed and new trial granted, costs to abide event."

Thomas Young for appellants.

N. S. Ackerly for respondents.

EARL, J., reads for reversal and new trial.

All concur.

Judgment reversed.

STEPHEN F. DOWLING, Appellant, v. JOAB L. CLIFT, Survivor,
etc., Respondent.

(Argued February 8, 1886 ; decided March 2, 1886.)

AFFIRMED on opinion below, and on the ground that as the principal question presented was one of fact, this court was concluded by the determination thereof, by the referee, affirmed by the General Term.

F. A. Lyman for appellant.

William G. Tracy for respondent.

Per Curiam opinion for affirmance.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

JOHN A. HUSSON, Respondent, v. WILLIAM G. OPPENHEIM,
Appellant.

(Argued February 9, 1886 ; decided March 2, 1886.)

THIS action was upon a contract. The questions presented here were simply as to the construction of the contract and the sufficiency of the evidence to sustain the findings of the trial court.

Mark Cohn for appellant.

Moore & Moore for respondent.

Per Curiam opinion for affirmance.

All concur.

Judgment affirmed.

MYRA E. FAVOR. Respondent, v. ANTHONY W. DIMOCK et al.,
Appellants.

(Argued February 9, 1886; decided March 2, 1886.)

George Putnam Smith for appellants.

Harry Wilber for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

CHARLES ROTHSCHILD et al., Respondents, v. CHARLES WERNER
et al., Appellants.

(Argued February 10, 1886; decided March 2, 1886.)

A. J. Simpson for appellants.

Edward S. Rapallo for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE FULLER ELECTRICAL COMPANY, Respondent, v. BENJAMIN
LEWIS et al., Appellants.

(Argued February 11, 1886; decided March 2, 1886.)

THIS was an action in the nature of a creditor's bill brought by plaintiff as a judgment creditor of the defendant Lewis, to reach property alleged to belong to him individually and also the proceeds of certain real estate which belonged to a firm of which he was a member, and which the complaint alleged was conveyed by the firm to defendant Thompson by conveyance

absolute on its face, but which was intended simply as a mortgage to secure an indebtedness of the firm. The real estate was subsequently sold by Thompson. It appeared that at the time of the conveyance the firm was insolvent and largely indebted.

The judgment among other things adjudged that the conveyance was intended as security only, and that the interest of Lewis in the property be subject to the payment of plaintiff's judgments, and that plaintiff was entitled to recover the amount thereof of defendant Thompson. *Held* error.

The court say :

"Not only do the pleadings admit individual property in the judgment debtor, but that fact is also found. Upon what principle then can the property of the firm be subjected to the payment of the individual debt of one partner? We know of none; yet by compelling Thompson to respond to the judgment, that result is reached. Nor is the plaintiff's case altered by the clause of the judgment which declares the surplus in Thompson's hands to be in trust for the firm, and the interest of Lewis therein subject to the judgment. There is nothing to warrant that conclusion. The firm is found to be indebted and to be insolvent. Its property, therefore, insufficient to pay its debts. It would be a fraud upon the joint creditors to apply any portion of its property to the payment of a debt for which neither they nor their property were liable, and if the property is insufficient to discharge the partnership debts, there would be no interest left to the individual partner, or for his creditors. As the case stands, the plaintiff must be content with the appropriation of the individual property of Lewis. The appeal of Thompson should, therefore, succeed, and as to him, the complaint be dismissed, with costs to be paid by the respondent. So far as the judgment relates to property other than that conveyed to Thompson by Lewis, Barry and Fay, viz. : Shares in the capital stock of The Brooklyn, Flatbush and Coney Island Railroad Company, and other individual property held or owned by Lewis, the judgment should be modified by directing the appointment of a receiver thereof, with the usual powers of receivers in such cases, and as so modified, affirmed without costs of this appeal to Lewis or to the respondent."

H. O. Place for appellants.

S. Sidney Smith for respondent.

DANFORTH, J., reads for reversal of judgment, and dismissal of complaint as to defendant Thompson, and for modification, and as to residue, for modification as above stated.

All concur.

Judgment accordingly.

JAMES H. CHAMBERS, Appellant, v. WILLIAM H. APPLETON et al., Respondents.

(Argued February 12, 1886 ; decided March 2, 1886.)

THE principal questions in this case were as to the construction of a contract, and as to whether the evidence sustained findings of the referee.

G. A. C. Barnett for appellant.

Edward W. Paige for respondents.

RUGER, Ch. J., reads for affirmance.

All concur.

Judgment affirmed.

PETER TOWNSEND, Respondent, v. CASSIUS H. READ et al., Appellants.

(Argued February 12, 1886 ; decided March 2, 1886.)

Christopher Fine for appellants.

I. T. Williams for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JEFFREY McCOLL, Appellant, v. JOSIAH J. FRITH et al., Respondents.

(Argued February 10, 1886; decided March 2, 1886.)

DECIDED ON the facts.

G. S. P. Stillman for appellant.

Edward M. Shepard for respondents.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

JANE C. COLEMAN, Respondent, v. OLIVER C. WRIGHT, Appellant.

(Argued January 27, 1886; decided March 9, 1886.)

Theodore Bacon for appellant.

George W. Miller for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

EZRA B. WESTON, Respondent, v. MOSES CHAMBERLAIN, Appellant.

(Argued February 4, 1886; decided March 9, 1886.)

Samuel Hand for appellant.

Joseph A. Shoudy for respondent.

Agree to reverse judgment unless plaintiff stipulates to reduce

the amount of damages to \$550 with interest from August 24, 1864, in that event to affirm.

All concur ; no opinion.

Judgment accordingly.

In the Matter of the Opening, Widening and Improvement
of FLUSHING AVENUE IN LONG ISLAND CITY.

(Argued March 2, 1886 ; decided March 9, 1886.)

THIS was a motion to vacate an order appointing commissioners of estimate and assessment in the matter above entitled.

The following is the *mem.* of opinion :

"The Flushing Avenue Improvement Commissioners appointed by the act chapter 326 of the Laws of 1881, gave notice that they would apply to the Supreme Court at a Special Term thereof, to be held at the Kings county court-house in the city of Brooklyn on the first Monday of July, 1881, on the opening of the court on that day, or as soon thereafter as counsel could be heard, for the appointment of three commissioners of estimate and apportionment for the purpose of widening and improving Flushing avenue, as provided in various acts of the legislature in relation thereto, and to make assessments therefor. The first Monday of July was the Fourth of July, and that being a legal holiday, no court was opened or held ; but on the next day, July fifth, the motion was made and an order was granted and entered appointing the commissioners, no one appearing in opposition thereto. The claim is now made on behalf of these appellants that that order was improperly granted on the fifth of July, as the court was not formally opened on the fourth and adjourned until that time. It appears by the affidavit made by the clerk of the Special Term of the Supreme Court that he gave due notice and made proclamation that the court would be adjourned to the following day, Tuesday, July fifth. The General Term has construed this affidavit to mean that the notice was

given and proclamation made on the fourth, and thus that the court was regularly adjourned in pursuance of the statute, and that, therefore, the order was regularly made on the next day. (Code, §§ 35, 36.) But even if this construction of the affidavit be erroneous and the notice was given and proclamation made by the clerk on the second of July, as claimed by the appellants, and even if there was no notice or proclamation of any kind at any time, the appointment of the commissioners on the fifth of July was at most a mere irregularity, and the order was not void. It does not appear that these appellants or any other persons were misled or that they appeared on the fourth. If they had appeared on that day it would have been quite easy for them to ascertain, by inquiry of the clerk or otherwise, the public and notorious fact that the court was not to be held on the fourth but that it would be open on the fifth. The affidavits used to oppose this motion show that these appellants had notice of the order soon after it was made, and yet they delayed until the fourteenth day of October—more than three months after the order was entered—before they made the motion to vacate it. In the meantime the commissioners appointed had gone on under the order with the knowledge of these appellants and substantially completed their report, and much expense in the execution of their duties had been incurred. Under such circumstances it could well be held that the appellants were precluded by their own *laches* from any right to raise the question of irregularity.

“The appellants also claim that the order appointing the commissioners was illegal and void for the reason that the act authorizing the improvement of Flushing avenue was unconstitutional and void, for various reasons alleged by them. They did not have the absolute right to prevail on their motion upon the constitutional grounds alleged by them, even if those grounds were well taken. The court could deny the relief claimed by them upon this motion, on the ground of *laches*, without passing upon the constitutional questions, as it was substantially decided in the *Matter of the Application of Emily P. Woolsey*, one of these appellants (95 N. Y. 135). But there is a still more satisfactory ground for denying the motion

made by these appellants. They are but two of the many persons affected by the order made. So far as appears, all the other persons whose lands were taken, and against whom assessments were made, have acquiesced in the order; and at the time this motion was made, as has been already stated, the commissioners of estimate and assessment had substantially completed their report. This order cannot be set aside as to these appellants and left to stand as to all the other parties interested. The appointment of these commissioners must stand as made or be wholly vacated. Many of the other parties may have consented to the order and acquiesced in it, or may have so acted under it as to have estopped themselves from denying its validity. Under such circumstances it is impossible to perceive how the court could set aside the appointment of these commissioners in part and leave it to stand in part. And upon this ground it was competent for the Supreme Court to deny this motion.

“If the act, for the purposes of which these commissioners were appointed, is unconstitutional and void, these appellants can raise the constitutional questions when their lands are taken, or when it is attempted to enforce any assessment against them; and it is better and wiser that they should be left to their remedy by action and not be permitted to pursue it by motion to vacate the order of which they complain.

“For all these reasons, therefore, we are of opinion that the order of the General Term should be affirmed, with costs.”

Frank E. Blackwell for appellants.

G. W. Cotterill for respondent.

EARL, J., reads for affirmance.

All concur.

Order affirmed.

HELEN A. BABCOCK et al., Respondents, v. OLIVER M. ARK-
ENBURGH, as Testamentary Guardian, etc., Impleaded, etc.,
Appellant.

(Argued March 2, 1886; decided March 9, 1886.)

Robert F. Little for appellant.

Everett P. Wheeler, Jr., for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. MAR-
TIN SCHWANER, Individually, and as Executor, etc., et al.

(Argued March 2, 1886; decided March 9, 1886.)

James O. De La Mare and *A. J. Vanderpoel* for appellant.

Charles W. West for respondent.

Agree to affirm on opinion of DANIELS, J., in court below.

All concur.

Order affirmed.

ARNOLD DAVIDSON, Respondent, v. JOHN F. BETZ et al., Ap-
pellants.

(Argued March 2, 1886; decided March 9, 1886.)

Samuel Untermeyer for appellants.

James M. Gifford for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

ANN MARIA DEEN, Respondent, v. WILLIAM MILNE, as Executor, etc., Appellant.

(Argued March 2, 1886; decided March 9, 1886.)

Edward C. Perkins for appellant.

Joseph A. Shoudy for respondent.

Agree to dismiss appeal ; no opinion.

All concur. :

Appeal dismissed.

THE PEOPLE, ex rel. DANIEL EVANS, Respondent, v. ALFRED C. CHAPIN, as Comptroller, etc., Appellant.

Where a person entitled to a legacy or distributive share of a decedent's estate is unknown, and the money has been paid into the State treasury pursuant to the directions of the Code of Civil Procedure (§ 2747), it is not money of the State, or belonging to any of its funds, or funds under its management within the meaning of the provision of the State Constitution (Art. 7, § 8), which prohibits the paying out of such moneys "except in pursuance of an appropriation by law," and upon compliance with the requirements of the Code and production of a certified copy of order directing payment of the legacy or distributive share to a claimant, it is the duty of the comptroller to draw his warrant therefor without such an appropriation.

(Argued March 2, 1886 ; decided March 9, 1886.)

THIS was an appeal from an order of General Term affirming an order of Special Term, which awarded a writ of peremptory *mandamus*, requiring the State comptroller to draw his warrant upon the State treasurer for the amount of moneys paid into the treasury by the administrator of the estate of Patrick Fox, deceased. The persons entitled to the moneys being unknown, the surrogate required them to be paid into the treasury, in pursuance of section 2747 of the Code of Civil Procedure.

Upon petition of the relator claiming to be entitled to the fund and upon report of a referee to whom the matter was

referred, who reported that the relator was entitled to the whole of the fund, an order was granted in accordance with the provisions of said section, directing the payment thereof to relator. The comptroller, however, upon presentation of a certified copy of the order, refused to draw his warrant upon the treasurer for the amount on the ground that no appropriation had been made by the legislature for the payment.

D. O'Brien, Attorney-General, for appellant.

William J. Ludden for respondent.

Agree to affirm on the ground that money paid into the State treasury, pursuant to section 2747 of the Code of Civil Procedure, is not money of the State or money belonging to any of its funds, or any of the funds under its management, within the meaning of section 8, article 7 of the State Constitution, and is not, therefore, subject to the prohibition of that section.

All concur ; no opinion.

Order affirmed.

CONSTANCE B. PRICE, Appellant, *v.* DEWITT C. HOLMAN et al.,
Executors, etc., Respondents.

SAME, Appellant, *v.* STEPHEN BROWN et al., Executors, etc.
Respondents.

(Argued March 2, 1886 ; decided March 9, 1886.)

M. A. Sheldon for motion.

Motions to dismiss appeals granted.

All concur.

Appeals dismissed.

WILLIAM T. RYLE, Respondent, v. WILLIAM P. BROWN, Appellant.

(Argued March 1, 1886; decided March 16, 1886.)

Delos McCurdy for appellant.

Preston Stevenson for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE SECOND NATIONAL BANK OF PATERSON, NEW JERSEY,
Appellant, v. ALFRED P. DIX et al., Respondents.

(Argued March 1, 1886; decided March 16, 1886.)

THE complaint was dismissed as to two of the defendants on trial. The court held that the case should have been submitted to the jury.

Preston Stevenson for appellant.

Thomas S. Moore and *Delos McCurdy* for respondents.

EARL, J., reads for reversal and new trial.

All concur, except DANFORTH, J., not voting.

Judgment reversed.

ROME, WATERTOWN AND OGDENSBURG RAILROAD COMPANY,
Appellant, v. JAMES E. SMITH, Respondent.

SAME, Appellant, v. CARROLL PHIPPANY, Respondent.

(Submitted March 2, 1886; decided March 16, 1886.)

THESE were appeals from orders of General Term affirming orders of Special Term denying motions to continue temporary injunctions.

The actions were brought to restrain defendants, who were town collectors, from collecting certain taxes assessed upon the property of plaintiff, which it claimed to be invalid because of defects in the affidavits attached to the assessment-rolls.

Wm. B. Hornblower for appellant.

Edmund L. Pitts and *John Cuneen* for respondents.

Agree to affirm without passing upon the validity of the original affidavits attached to the assessment-rolls.

All concur.

Orders affirmed.

In the Matter of the Application of THE NEW YORK, WEST SHORE AND BUFFALO RAILWAY COMPANY to acquire title to lands.

(Argued March 2, 1886; decided March 23, 1886.)

THESE were proceedings to acquire title to certain uplands on the west bank of the Hudson river under the General Railroad Act. The owner of the land sought to be condemned, objected to the report of the commissioners fixing the damages, alleging that the railroad company proposed to build a solid embankment across a bay, and in front of the premises of the owner, cutting off a wharf belonging to her from the river, and depriving her of the use thereof, and that no damages were awarded to her therefor.

The following is the *mem.* of opinion :

"It is claimed that the building of the embankment and the laying of the railroad track across the bay, thus cutting off the dock of the appellant, is a violation of section 28, chapter 140, Laws of 1850; that this dock has been used by appellant and her ancestors for more than forty years for freighting purposes,

etc.; that the railroad company have built a solid embankment, on which trains are running, across the bay, which has cut off all communication between appellant's wharf and the water inside and the river outside of the embankment.

"This point does not arise upon the papers presented on this appeal. The petition asks to take only a piece of upland described in the schedule by courses and distances, and as containing four and fourteen one-hundredths acres, more or less. The respondent did not apply for any right to cross the bay or in any way interfere therewith. It only sought to take a piece of upland which was described in the petition.

"In regard to the taking of this land there can be no valid legal objection to the proceedings. As to any interference otherwise the remedy is not by an appeal from the order in this matter. If the petitioner has erected a nuisance in front of the appellant's wharf, which unlawfully interferes with her rights and privileges, she can proceed by an action at law against it for damages, or by an equitable action to remove the same. She has no redress upon this appeal.

"No other question is raised which requires examination.

"The order should be affirmed, with costs."

Edward Wells for appellant.

Calvin Frost for respondent.

MILLER, J., reads *mem.* for affirmance.

All concur.

Order affirmed.

BENJAMIN BRONK, Respondent, v. THE BOSTON AND ALBANY
RAILROAD COMPANY, Appellant.

(Argued March 8, 1886; decided March 23, 1886.)

John Cadman for appellant.

Samuel Edwards for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

EDWIN P. MERRITT et al., Appellants, v. HENRY W. H. FITZGERALD, Respondent.

(Submitted March 3, 1886; decided March 23, 1886.)

S. F. Kneeland for appellants.

Samuel A. Noyes for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THOMAS C. SIMONTON et al., Appellants, v. FREDERICK P. HAYS et al., Respondents.

(Submitted March 3, 1886; decided March 23, 1886.)

D. H. Bolles for appellants.

George H. Phelps for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THOMAS J. POPE et al., Respondents, v. JAMES McNIDER, Appellant.

(Argued March 3, 1886; decided March 23, 1886.)

Adolph L. Sanger for appellant.

W. W. Niles for respondents.

Agree to affirm ; no opinion.

All concur, except *FINCH, J.*, dissenting.

Judgment affirmed.

ALIDA F. FLINT, Appellant, v. CALVIN H. BELL, Respondent.

(Argued March 4, 1886 ; decided March 23, 1886.)

O. W. Smith for appellant.

Amasa J. Parker for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

**MARY PERRY, Respondent, v. THE ROME, WATERTOWN AND
OGDENSBURG RAILROAD COMPANY, Appellant.**

(Submitted March 4, 1886 ; decided March 23, 1886.)

Edmund B. Wynn for appellant.

D. Magone for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

**ANNIE M. WOOLLEY et al., Appellants, v. FRANCIS B.
BALDWIN, Respondent.**

A failure upon the part of a county treasurer to collect a bond and mortgage in his hands as such, is not alone sufficient to create a liability against him, facts must be shown establishing a neglect of duty on his part.

(Submitted March 4, 1886 ; decided March 23, 1886.)

THIS action was brought to recover damages for a failure on the part of defendant to collect a bond and mortgage, which defendant, as county treasurer, received from his predecessor in office.

The complaint was demurred to, and defendant had judgment upon the demurrer.

The following is the *mem.* of opinion :

"The appellants claim that the complaint shows gross negligence on the part of the defendant as trustee, in not enforcing prompt payment of the interest, or else foreclosing the mortgage at once.

"The complaint shows that when the defendant came into office as county treasurer, in 1879, he received, as such, a bond and mortgage of \$5,000, in which the plaintiffs, as infants, were interested to the extent of \$3,775.90; that the interest thereon was in arrears from November 1, 1876, and that although the property had greatly depreciated in value and was worth less than the amount of the mortgage, and although the mortgagor was insolvent, the defendant collected no interest on the mortgage and did not commence a foreclosure on the same until May, 1880. The complaint also alleged that the mortgage was due May 1, 1877, and further, that upon the foreclosure sale the property was sold for \$1,105, of which the plaintiffs received \$454.74, leaving a balance of \$4,435.67 due them. It contained no averment that the defendant had any knowledge as to the value of the property or of the insolvency of the mortgagor.

"The question then is, whether the delay in commencing the foreclosure for sixteen months after he came into office, when two years interest was due thereon when he took his office, renders the defendant liable, without alleging in the complaint that he was chargeable with negligence in not ascertaining the value of the property, the insolvency of the mortgagor, and in omitting to foreclose the mortgage.

"Not alleging the facts or any of them renders the complaint defective in not showing on its face that the defendant was chargeable with a neglect of duty. As it stands, it does not charge negligence, but merely avers a failure to collect,

which, of-itself, is insufficient to create a liability on the part of the defendant and makes out no cause of action.

"The judgment should be affirmed with leave to the plaintiff to amend on payment of costs."

Horace Secor, Jr., for appellants.

John J. Armstrong for respondent.

Per Curiam mem. for affirmance.

All concur.

Judgment affirmed.

101 690
109 852

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
PETER LOUIS OTTO, Appellant.

(Argued March 6, 1886; decided March 23, 1886.)

DEFENDANT was convicted of murder in the first degree. The following is an extract from the opinion :

"We are all agreed that no point is stated on which this appeal can prevail. *First.* As to the juror, Alger. Upon his examination as to the competency, it appeared that at the time of the murder he read some notice of the circumstances in one newspaper, and more recently in another, but he had no 'formed impression about it,' or 'firm opinion.' Such opinion or impression as he had he could lay aside, and 'sit as a juror in this case and render an impartial verdict according to the evidence.' The prisoner challenged for cause. Assuming that the challenge was sufficient in form (§ 380, Code of Crim. Pro.), it was for the trial court to determine whether the juror entertained such opinion or impression as would influence his verdict. (§ 376, subd. 2.) It was apparent that he had no prejudice against the prisoner, and his mind was free to receive the evidence and decide upon it fairly and impartially; he was, therefore, qualified to sit."

After a consideration of the testimony given on the trial, the court reached the conclusion that "there was abundant evidence

of premeditation and deliberation," and that the verdict was properly rendered.

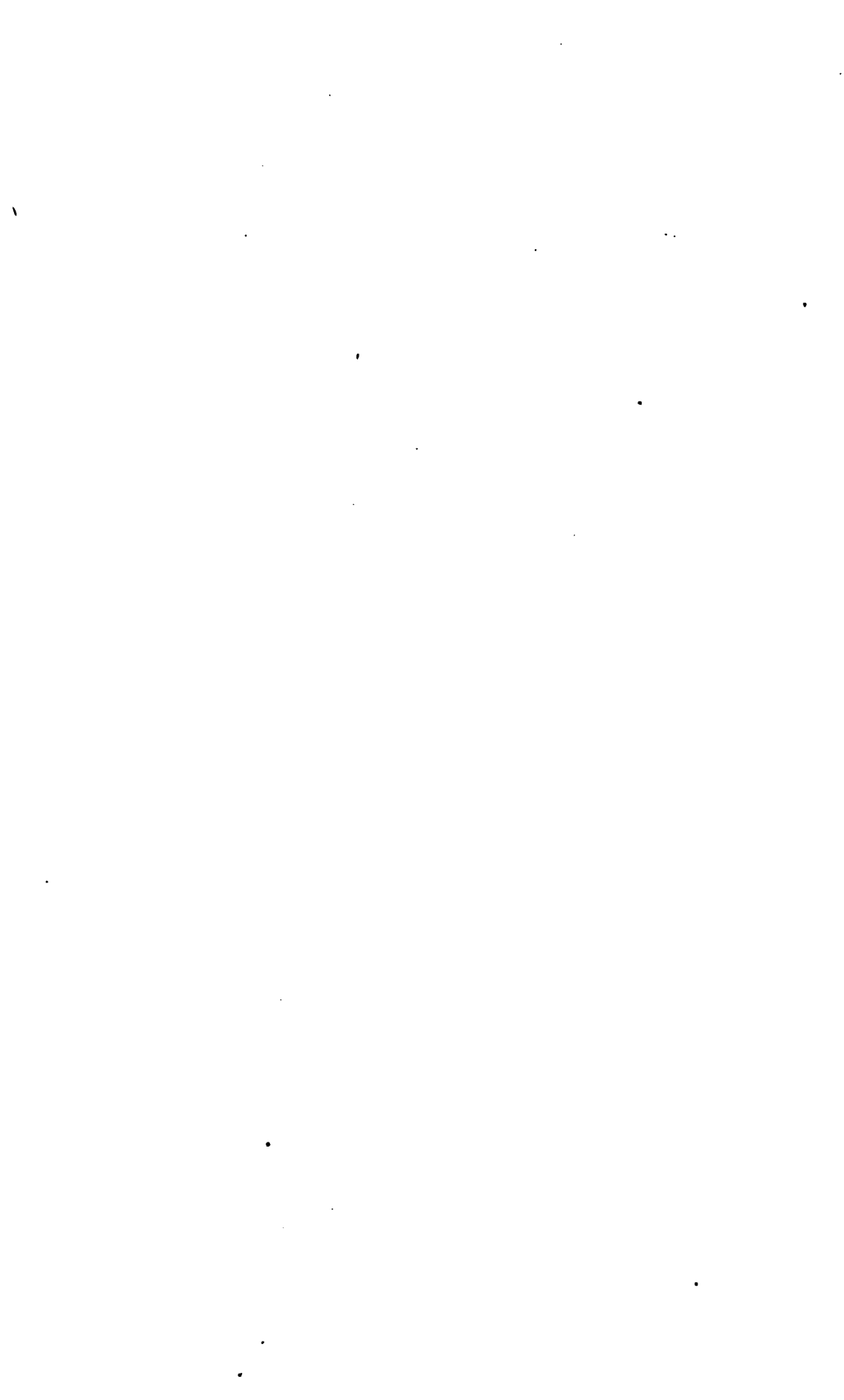
H. J. Swift for appellant.

George T. Quinby for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.



INDEX.

ACCEPTANCE.

Where an executory contract for the sale of goods is with warranty, that they shall be good, sound, and all right, and equal to a sample shown, an acceptance of the goods after opportunity to examine them does not preclude the purchaser from claiming and recovering damages for breach of the warranty. *Kent v. Friedman.* 616

ACCOUNTS.

Where items of an account or claim are numerous, and therefore difficult to be retained in the memory, the court, in its discretion, may permit a witness to refer to memoranda, proved to be correct both as to items and value. *Wise v. Phoenix F. Ins. Co.* 637

ACCOUNTING.

1. This action was brought for an accounting and to recover for labor and services alleged to have been rendered under an agreement between the parties, by which plaintiff was employed to oversee, take charge of, carry on, and labor in the business of the defendant, and the latter agreed to pay him for such service one-half the profits of the business after deducting interest on the capital invested, the business carried on by defendant was that of mason and builder. Upon the trial defendant claimed credit for moneys paid as gratuities to the architects having charge of the work. There was no proof that the payments

were beneficial to the parties, or that they were necessary or justifiable upon business principles. *Held*, that the credits were properly rejected. *Marsh v. Masterton.* 401

2. Defendant, after plaintiff's employment had terminated, took in payment for work done, from a person perfectly responsible, two bonds which he knew at the time to be worthless. *Held*, that defendant was not entitled to any deduction for the loss thus sustained. *Id.*

ACCOUNT STATED.

1. Where, after a settlement and adjustment of an account between the parties, a mistake as to one item thereof is discovered, and an action is brought to correct the mistake, this does not give to the defendant a right to have the whole account opened; the mistake may be corrected and the right of the parties readjusted in regard thereto, but in other respects defendant is bound by the account, actually settled, unless he can show some mistake or fraud in the settlement in respect to other items. *Carpenter v. Kent.* 591

2. Defendant had a department for the general clearance of contracts between its customers for the purchase and sale of gold, known as the "Clearing-House." Clearances were made each day by means of statements furnished by the dealers to defendant, of purchases and sales made by them; defendant acting simply as mutual agent for the

parties. On a day when many members of the clearing-house had failed to perform their contracts, and when there was great confusion in regard to them, O. & Co., plaintiff's assignor, presented two separate statements, one in the morning, and one in the afternoon. In the first was an item of a transaction between O. & Co., and a firm which failed on the morning of that day. It was not usual to present more than one statement during the same day. When O. & Co. called upon defendant for the balances shown to be due that firm by the statements, they were advised by its president, that owing to the confusion in business, he could not tell how the statements stood, and that the bank would only pay approximate balances, reserving a margin to secure defendant against failures. Defendant accordingly paid \$30,000 on the second statement, leaving \$10,000 unpaid thereon, and paid nothing on the first. In an action to recover the balances shown by the statements, *held*, that to entitle plaintiff to recover, it was necessary for it to show a clearance, by defendant, of the statements, and that a balance had been struck in favor of O. & Co. which made out a demand in the nature of an account stated, that the statements were to be taken and considered together as but one statement; but that if considered separately, there was no such clearance of either as bound defendant, and that plaintiff was not entitled to recover. *Nat. City Bk. v. N. Y. G. Ex. Bk.* 595

3. The only portion of the statement which was questioned was the item of the transaction with the insolvent firm; plaintiff claimed defendant was liable because of an omission on its part to notify O. & Co. of the failure; it appeared that O. & Co. had knowledge of the fact. *Held*, that, having such knowledge, the fact that they were not notified thereof by defendant was immaterial. *Id.*

ACCRETION.

1. When soil has been wrongfully deposited by human hands in the

ocean or other public waters, in front of the uplands, so that the water-line is carried further out, the same rule applies as when such a deposit has been gradually made by natural causes, *i. e.* the accretion becomes the property of the owner of the upland, and his title still extends to the water-line. *Steers v. City of B'klyn.* 51

2. Plaintiff owned a lot in the city of B., bounded easterly by the water-line of the East river, and southerly by the central line of J. street, which street terminated at said water-line. A wharf had been built in front of his lot extending to the center of said street, which plaintiff maintained, receiving wharfage from all persons using the same. The city authorities built a pier at the end of the street, shutting off from the water that portion of plaintiff's wharf in front of his half of the street. In an action to recover damages, *held*, that the erection of the pier was a wrongful interference with plaintiff's rights, and rendered the city liable; that the pier was to be considered as an accretion, and so much of it as was in front of his half of the street became his; also, that plaintiff was entitled to recover, as damages, the wharfage received by the city from that portion of the pier in front of his land; that defendant, having wrongfully collected the wharfage was not entitled to any allowance for expenses incurred in collecting the same, or for the cost of building the wrongful structure, or keeping it in repair. *Id.*

ACKNOWLEDGMENT.

1. When a deed has been duly acknowledged, although there appears to have been a subscribing witness, it is not necessary to call him for the purpose of proving an execution. *Simmons v. Havens.* 427
2. On the same paper, and following the signatures to an assignment for the benefit of creditors, was written a notary's certificate of acknowledgment. It bore the same date as the assignment, and named as

the persons acknowledging the ones who apparently executed the assignment. It stated that the persons named were to the notary known "to be the individuals described in, and who executed the same" *Held*, that the words "the same" referred to the instrument to which the certificate was appended, and sufficiently identified it; and that the certificate showed a due acknowledgment of the instrument. *Smith v. Boyd.* 472

ACTION.

The complaint in this action alleged in substance that plaintiff, having in his possession certain property pledged to him as security for a debt, delivered the same to the defendant under an agreement between the parties and the pledgor, that defendant should receive the property, sell the same, and out of the proceeds pay plaintiff's claim; that defendant sold the property and has in his possession sufficient of the avails to pay plaintiff's debt, but refuses so to do. *Held*, that the action was *ex contractu*, and no order of arrest having been issued therein a judgment in plaintiff's favor did not authorize an execution against the person. (Code of Civ. Pro., § 549.) *Chapin v. Foster.* 1

See CAUSE OF ACTION.

ACTS OF CONGRESS.

See NATIONAL BANKS.

ADMISSIONS AND DECLARATIONS.

—*Declarations of one of the parties to a crime which are simply narratives of past transactions, and form no part of the res gestæ, are not admissible against an associate in crime.*
See People v. Murphy. 126

ADULTERY.

1. In a civil action the fact of adultery may be established by proof

of such facts and circumstances, as, under the rules of evidence, are competent to be proved, and which satisfy the mind of the tribunal required to pass upon the question of the truth of the charge. It is not necessary to satisfy the mind beyond a doubt, or to lead the judgment as a necessary conclusion to the determination that adultery has been actually committed. *Allen v. Allen.* 658

2. No different standard of judgment applies to such a case from that which, in ordinary transactions, guides the conclusions of intelligent and conscientious men. *Id.*

AFFIDAVITS.

—*Sufficiency of affidavit to give jurisdiction, and to sustain order for summons by publication.*

See Kennedy v. N. Y. L. Ins. & T. Co. 487

ALTERATION OF INSTRUMENT.

1. Where an insurance company in issuing a policy deals with a party who remains in possession of it after execution, and is alone entitled to receive the amount thereof in case of loss, it is authorized to assume that such party has power to consent to such changes in it before breach, as will inure to the benefit of the insured. This is especially the case when the proposed alteration can neither injuriously affect the right of enforcing the contract or change the application of the moneys collectible thereon. *Martin v. Tradesmen's Ins. Co.* 498

2. An alteration of a contract made by one of the parties, or a third person without the consent of the other party, and while the contract is out of his hands, has no effect as to him, and the contract remains as it was originally, provided that the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed. *Id.*

3. At the request of an insurance broker, apparently acting on behalf

of mortgagees, defendant issued and delivered to the broker a policy of marine insurance upon the mortgaged property, which stated that it was issued on account of plaintiffs, loss, if any, to be paid to the mortgagees, and thereafter at the request of some one presumably representing the mortgagees, and upon the statement that G. owned the property, plaintiffs' names were erased by drawing a line through them, leaving them, however, perfectly legible, and the name of G. was interlined above them, and after the names of the mortgagees was inserted "to the extent of their interest, and balance, if any, to John Butler." The interest of the mortgagees was the full amount insured. G. in fact had the legal title to the property, he holding it in trust, however, for plaintiffs and Butler. *Held*, that an action for a destruction or conversion of the policy was not maintainable, as the alteration was not tortious, and plaintiffs suffered no damage therefrom. *Id.*

APPEAL.

1. Where an order setting aside an execution against the person, with costs, imposes as a condition that defendant shall stipulate not to sue for damages for an arrest under the execution, defendant has the right to appeal from that portion containing the condition so long as he has not availed himself of the portion awarding costs; it is not necessary to appeal from the whole order. *Chapin v. Foster.* 1
2. The order appealed from herein affirmed a Special Term order vacating an attachment. Neither order stated the ground for the decision. *Held*, that it was discretionary with the court below to determine, from the facts stated, whether a case for an attachment was made, and its decision was not reviewable here. *Thorington v. Merri-ck.* 5
3. Where prior to the passage of the act of 1885 (Chap. 17, Laws of 1885), "for the relief of the village of Clin-

ton," proceedings had been commenced by the board of water commissioners of said village under the act of 1875 (Chap. 181, Laws of 1875), authorizing villages to furnish pure and wholesome water to their inhabitants, and an application for the appointment of commissioners to appraise damages had been denied at Special Term, on the ground of non-compliance with the requirements of the act last mentioned—*Held*, that the act of 1885 was properly before the General Term on appeal from the Special Term order, and rendered a decision upon the original proceedings unimportant; and that, therefore, a reversal of the order of Special Term with leave to make "application to the Special Term for the appointment of commissioners," was proper. *Bd. Water Comm'rs v. Dwight.* 9

4. Where, on reversal of a judgment, this court directed immediate restitution of certain real estate of which one of the appellants had been dispossessed by means of the erroneous judgment, and that the *mesne* profits up to the time of the restitution be ascertained and paid to him, — *held*, the intent was to provide for the same compensation for withholding the real estate to which the appellant would have been entitled on recovering the same in an action of ejectment; and that an order entered upon the decision providing that "the value of the rents and profits" be ascertained was substantially in accord with the decision. *Wallace v. Berdell.* 13
5. The order of restitution contained a provision not contained in the decision, to the effect that the restitution and payment should be without prejudice to the right of the owner to commence and maintain any suit or proceeding for waste or injury to the property. *Held*, that while perhaps the provision was superfluous, as it was not the intent of the court to deprive said owner of any such right of action, if he had any, the order as entered was proper. *Id.*

6. A notice of appeal to this court from an order granting a new trial, which does not contain an assent on the part of the appellant as required by the Code of Civil Procedure (Subd. 1, § 191) that, if the order is affirmed, judgment absolute shall be rendered against him, is fatally defective. *Lans v. Wheeler.* 17
7. Assuming that the time to appeal from an order granting a new trial might be extended by the facts that the appeal cannot be taken without leave of the General Term, and that such leave could not be obtained until the next General Term, the notice of appeal must at least be served within sixty days after leave is granted. It is immaterial that the appellant fails to enter the order granting leave, he cannot extend his time to appeal by delaying to enter an order obtained for himself, upon his own motion. *Id.*
8. Where it affirmatively appears that an erroneous charge could not have affected the verdict it is not ground for reversal. *Clover v. Greenwich Ins. Co.* 277
9. In an action upon an undertaking given upon appeal, the defense was that no written notice of the entry of the order or judgment affirming the judgment appealed from was served ten days prior to the commencement of the action, as required by the Code of Civil Procedure (§ 1309): a notice was served, subscribed, and indorsed by the attorney, but the indorsement did not state his post-office address or place of business. The appellant's attorney received and retained the notice and admitted service thereof. *Held*, that a decision of the General Term to the effect that the acceptance and retention of the notice was a waiver of the irregularity was justified and was not reviewable here. *Evans v. Backer.* 280
10. An order, reversing on *certiorari* the proceedings of the commissioners of taxes and assessments in the city of New York, in the assessment of property, is final and so reviewable here, although by the terms of the order the matter is remanded to the commissioners for farther proceedings, as they have no authority to proceed under the order. *People, ex rel. N. Y. & H. R. R. Co., v. Com'r's Taxes.* 822
11. An order denying a motion of other judgment creditors to be allowed to intervene in an action by a judgment creditor to set aside as fraudulent a conveyance by the judgment debtor, is discretionary and is not reviewable here. *White's Bk. of Buffalo v. Farthing.* 344
12. Under the provision of the Code of Civil Procedure (§ 1778), providing that in an action against a foreign or domestic corporation upon "a promissory note or other evidence of debt, for the absolute payment of money," the plaintiff may take judgment as in case of default, unless defendant serves with its answer or demurrer a copy of an order directing the issue to be tried, a decision refusing to a corporation an order for the trial of the issues presented by its answer in such an action is reviewable on appeal. *Moran v. L. I. City.* 439
13. Where plaintiff in an action of ejectment claims title in fee to the whole premises, and recovers judgment in accordance with his claim, and where the title set up is in fact invalid, but it appeared on the trial that plaintiff has an independent and unimpeachable title to an undivided share of the premises, it is in the discretion of the General Term, either to modify the judgment or to reverse it and grant a new trial; and its determination in the exercise of this discretion is not reviewable here. *Van Horne v. Campbell.* 608
14. For the purposes of an appeal, a judgment in proceedings by *certiorari* to review an assessment under the act of 1880 (Chap. 269, Laws of 1880) is to be considered as an order, and an appeal to this court must be taken within the

time prescribed for appeals from orders, *i. e.* sixty days. *People, ex rel. W. V. R. R. Co., v. Keator.*

610

15. The provision of the Code of Criminal Procedure (§ 527, as amended by chapter 360, Laws of 1882), authorizing the appellate court to order a new trial in a criminal action, although no exceptions were taken on trial, applies only to the Supreme Court; this court has no authority to review the judgment unless exceptions have been duly and properly taken. *People v. Donovan.*

632

16. The provision of the act of 1880 (§ 6, chap. 269, Laws of 1880) providing for the review and correction of assessments, which declares that costs shall not be awarded against assessors whose proceedings may be reviewed under the act, only relieves the assessors from costs upon the hearing at Special Term. Costs of appeal are to be given or withheld in the discretion of the court. (Code of Civ. Pro., § 3239.) *People, ex rel. Smith, v. Com'r's Taxes, etc.*

651

ARBITRATION.

Under an arbitration clause in a policy of fire insurance, it is the duty of the parties to the contract to act in good faith to accomplish the appraisal in the way provided; and if either acts in bad faith so as to defeat the real object of the clause, the other is absolved from compliance therewith; and so, when one arbitration fails from default of one of the parties, the other is not bound to enter into a new arbitration agreement. *Uhrig v. Williamsburgh City F. Ins. Co.*

362

ASSESSMENT AND TAXATION.

1. Under the statutes regulating appeals to the State assessors from equalizations made by boards of supervisors, of the valuation of property in their respective counties (Chap. 312, Laws of 1859;

chap. 327, Laws of 1873; chap. 351, Laws of 1874; chap. 49, Laws of 1876; chap. 80, Laws of 1880), where such an appeal is dismissed, the costs and expenses incurred by the board may be charged against the town, city or ward appealing. *People, ex rel. Supervisors Ulster Co., v. Common Council.*

22

2. Under said acts the employment of necessary appraisers and searchers by the board at a reasonable *per diem* compensation, and the necessary disbursements in preparing for the investigation are legal items of expenses chargeable under the statute; and the decision of the board of supervisors—the auditing board created by the acts—as to the amount and reasonableness of the expenses incurred, in the absence of fraud or collusion, is final and conclusive. *Id.*

3. It was within the power of the legislature to constitute the board of supervisors a board to audit the expenses chargeable upon the party appealing. In making the audit the members of the board simply discharge a duty of public administration, cast upon them by law, and are neither within the letter nor the spirit of the statute prohibiting a judge from sitting in a case in which he is a party or is interested. *Id.*

4. The power conferred upon the commissioners of Central Park by said act of 1866 (Chap. 367, Laws of 1866), in respect to the improvement directed, and subsequently transferred to the department of public works (Chap. 383, Laws of 1870; chap. 872, Laws of 1872), is exclusive of that conferred upon any other body; and the manner of doing the work is left to their discretion. *In re Knaust.*

188

5. Accordingly *held*, it was no objection to an assessment for the improvement that there was no ordinance of the common council authorizing it, or that the work was not done by contract let to the lowest bidder. *Id.*

6. Where an assessment for a local improvement is valid upon its face,

but is in fact void because the assessors had no jurisdiction to impose it, an action may be maintained to recover back money involuntarily paid in satisfaction thereof without first having the assessment set aside or vacated. *Bruecher v. Village of Port Chester.* 240

7. Errors and irregularities in assessments for street openings in the city of New York must be corrected and reviewed in the proceedings themselves, they cannot be reached by a collateral action in equity. An order confirming the assessment has the force and conclusiveness of a judgment. *Mayer v. Mayor, etc.* 284

8. The provision of the Consolidation Act (§ 897, chap. 410, Laws of 1882), declaring that no suit in equity or otherwise "shall be commenced for the vacation of any assessment in said city," is not limited to any particular class, but applies to every assessment. *Id.*

9. The expenses of opening a street were assessed partly upon the property benefited and partly upon the city at large. After the confirmation of the report of the commissioners, in which was included an item for their fees and expenses, the city resisted that claim and succeeded in effecting a settlement by which the item was largely reduced. *Held*, that an owner of property assessed was entitled to maintain an action in equity to compel the application, upon his assessment of a *pro rata* share of the amount saved; but that he was liable to interest from the date of the assessment; this being in no manner affected as a complete and binding adjudication by the allowance, which was simply in the nature of a credit to be applied on a conceded debt. *Id.*

10. In an action to restrain the sale of land for non-payment of an assessment for a local improvement and to set aside the assessment because of alleged invalidity in the proceedings, the burden is upon plaintiff to establish the invalidity complained of. There is no pre-

sumption in such an action that municipal authorities have acted illegally or that conditions precedent have not been performed. *Tingue v. Village of Port Chester.* 294

11. Where, therefore, in an action to restrain the sale of plaintiff's lot in the village of Port Chester, and to set aside an assessment thereon for grading a street, it appeared that the charter of the village (§ 4, tit. 5, chap. 818, Laws of 1868) requires the petition for laying out a street to be signed by persons owning land on the line thereof, but does not require the fact of such ownership to be stated in the petition. *Held*, the fact that the petition for opening the street in question did not show on its face that the persons signing it were such owners did not tend to negative their ownership; and, in the absence of other proof, that the invalidity of the proceedings in this respect was not established. *Id.*

12. The distinction between such a case and one where the owner of a tax title seeks to enforce it by action pointed out. *Id.*

13. Also *held*, that as to other objections which related to matters which might have been corrected on appeal from the report of commissioners, plaintiff was foreclosed by the order of confirmation. *Id.*

14. Also *held*, as it appeared that the parties interested in the lands taken for the street, and among them plaintiff's grantor, who then owned the lot, accepted the awards made to them, and acquiesced in the proceeding, he was concluded from alleging irregularities therein. *Id.*

15. Also *held*, the fact that the specifications upon which the bids for grading were based embraced another street as well as the one in question was immaterial, it appearing that profile maps showing the amount and kind of excavation and filling required on each street were separately made and filed with the specifications. *Id.*

16. Also *held*, that the charter (§ 23,

- tit. 5) did not require the trustees of the village to pass upon the bids at the time of opening them; that time for comparison of the bids and calculation to determine which was most preferable was essential and might be taken. *Id.*
17. It was objected that the notice of the meeting of the trustees to act in respect to the grading did not describe the district of assessment with sufficient accuracy. The street had then been laid out and the map and report of the commissioners filed. The notice referred to the street by its name and described the assessment district as including "all the lands on both sides of said street to a depth not exceeding one hundred feet." *Held*, that this was a substantial compliance with the charter (§ 23, tit. 5). *Id.*
18. This was a reassessment; the original assessment made in March, 1874, having been declared invalid and set aside (71 N. Y. 309). *Held*, that there was no legal or valid authority to make a reassessment; that no such authority was conferred by the original charter; that the provision in the act of 1877, amending the charter (Chap. 227, Laws of 1877), which authorized reassessments in certain cases where prior assessments had been set aside or held invalid, only applied to assessments so set aside or held illegal after the passage of the act, and that the act of 1878 (Chap. 277, Laws of 1878), which attempted to authorize reassessments in cases of assessments set aside or vacated, before as well as after the passage of the act, was void as in contravention of the provision of the State Constitution (Art. 3, § 16), directing that a local or private bill shall embrace but one subject, and that shall be expressed in the title. *Id.*
19. An order, reversing on *certiorari* the proceedings of the commissioners of taxes and assessments in the city of New York, in the assessment of property, is final and so reviewable here, although by the terms of the order the matter is remanded to the commissioners for further proceedings as they have no authority to proceed under the order. *People, ex rel. N. Y. & H. R. R. Co., v. Com'rs Taxes, etc.* 823
20. The "tunnels, tracks, substructures, superstructures, stations, viaducts and masonry" of the N. Y. & H. R. R. Co., situate on and under Fourth avenue in the city of New York are "land" within the meaning of that word as used in the statute in reference to property liable to taxation (1 R. S. 887, § 2), and are assessable as such. *Id.*
21. The fact that certain of the structures were built for the purpose of furnishing to the public safe and convenient crossings over the railroad tracks, in compliance with the requirements of the act of 1872 (Chap. 702), and that under said act the city is required to pay a portion of the expense of the construction, does not divest the structures of the incidents attached to the other property belonging to the railroad company, or give the city any title thereto. *Id.*
22. As regards taxation it is immaterial whether a railroad is laid upon the surface, placed on pillars, or carried through a covered way or tunnel, the structures adopted to sustain it, or facilitate and protect its use are, within the meaning of the law, land, and for them the railroad company is liable to be taxed. *Id.*
23. For the purposes of an appeal, a judgment in proceedings by *certiorari* to review an assessment under the act of 1880 (Chap. 269, Laws of 1880) is to be considered as an order, and an appeal to this court must be taken within the time prescribed for appeals from orders, *i.e.* sixty days. *People, ex rel. W. V. R. R. Co., v. Keator.* 610
24. The provision of the act of 1880 (§ 6, chap. 269, Laws of 1880) providing for the review and correction of assessments, which declares that costs shall not be awarded against assessors whose

proceedings may be reviewed under the act, only relieves the assessors from costs at the hearing at Special Term. Costs of appeal are to be given or withheld in the discretion of the court. (Code of Civ. Pro., § 3239.) *People, ex rel. Smith, v. Com'r's Taxes, etc.* 651

— *Where consideration of question as to constitutionality of law authorizing a local improvement properly refused, on motion to vacate appointment of commissioners and party left to his remedy by action.*

See In re Opening, etc., of Flushing Avenue. (Mem.) 678

— *Where notice of application to appoint commissioners, in proceedings for local improvement, is given for a day which is a public holiday, the appointment of commissioners the next day, at most a mere irregularity, the order not void.*

See In re Opening, etc., Flushing Avenue. (Mem.) 678

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. On the same paper, and following the signatures to an assignment for the benefit of creditors, was written a notary's certificate of acknowledgment. It bore the same date as the assignment, and named as the persons acknowledging the ones who apparently executed the assignment. It stated that the persons named were to the notary known "to be the individuals described in, and who executed *the same*." *Held*, that the words "the same" referred to the instrument to which the certificate was appended, and sufficiently identified it; and that the certificate showed a due acknowledgment of the instrument. *Smith v. Boyd.* 472

2. The General Assignment Act of 1877 (Chap. 468, Laws of 1877) does not include or apply to a specific assignment by a debtor for the benefit of one or a portion of his creditors, and such an assignment is not void because not executed in compliance with the provisions of said act. *Royer Wheel Co. v. Fielding.* 504

3. A member of a firm may appropriate his individual property to the payment of the firm debts, and where the firm has made a general assignment for the benefit of its creditors a conveyance by one of its members of his individual property to the assignee, to be disposed of and applied in accordance with the terms of the assignment to the payment of the partnership debts, is not *per se* fraudulent or unlawful and void. *Id.*

4. It is not essential that such a conveyance should be executed in accordance with the requirement of the General Assignment Act. *Id.*

ASSOCIATIONS.

See CORPORATIONS

ATTACHMENT.

1. In an action to compel a trustee to account and pay over the sum found due, and to convey to plaintiffs the trust estate, an attachment will not lie. (Code of Civ. Pro., § 635.) *Thorington v. Merrick.* 5

2. The affidavit upon which an attachment was issued in such an action stated that "the amount of plaintiff's claim in said action is, to-wit: \$10,000, or other larger sum with interest * * * over and above all discounts and set-offs," and as grounds of the claim, alleged in substance that a claim for \$9,000, secured by mortgage, was put into defendants' hands for collection, they agreeing to account for and turn over the proceeds; that they collected and discharged the claim, receiving on such settlement certain real estate "of great value," the title to which they took in their own names, a portion of which they collusively and without the knowledge of the owners of the claim disposed of, and the balance they hold; but refuse to convey or to account for moneys received. *Held*, that the affidavit was insufficient, under the Code of Civil Procedure (§ 636), to warrant the attachment, as it did not state that a specific sum was due over

and above all counter-claims, or that plaintiffs were entitled to recover any sum: and that the facts stated fail to show that plaintiffs are entitled to recover the sum named. *Id.*

3. The order appealed from affirmed a Special Term order vacating the attachment. Neither order stated the ground for the decision. *Held*, that it was discretionary with the court below to determine, from the facts stated, whether a case for an attachment was made, and its decision was not reviewable here. *Id.*

4. Plaintiffs commenced an action against defendant, McC., by service of summons by publication. An attachment was issued therein, which was levied upon certain lands, and plaintiffs obtained judgment. In an action brought to set aside as fraudulent against creditors, a conveyance of land by McC. to defendant McG., and to have the judgment declared a lien thereon, the latter attacked the attachment proceedings and the judgment. McG. was found guilty of co-operating with McC. to defraud his creditors. *Held*, that the proceedings should be upheld unless absolutely void for jurisdictional defects, and that they should be liberally construed to uphold the judgment, although they might have been held insufficient in a direct proceeding by the judgment debtor to set them aside. *Denman v. McGuire.* 161

ATTORNEYS.

Where upon a copy of a judgment served was indorsed the name of the attorney with his post office and business address, and below was indorsed a notice of judgment signed by the attorney without giving any address, *held*, that this was a sufficient compliance with the rule of practice (Rule 2), requiring papers served to be indorsed or subscribed by the attorney, with his address, etc. *People, ex rel. W. V. R. R. Co., v. Keator.* 610

BANKS AND BANKING

1. Plaintiff, at the request of B., deposited certain moneys belonging to the latter, with defendant; he made the deposit, however, in his own name, to the credit of a deposit account he then had with defendant, and gave to B. two checks for the amount, which the latter, on February 22, 1869, indorsed and delivered to E. as part consideration for her promise to marry him. On the next day, proceedings *de lunatico inquirendo* were instituted against B. and an inquisition therein, held March tenth, adjudged him to be of unsound mind and that he had been, for a period of six months. Pending the proceeding, an order was made enjoining the defendant from paying over the moneys to any one. On March thirty-first an order was made confirming the inquisition and directing defendant to pay the said moneys to the committee thereby appointed, and on April fifteenth defendant complied with the order. On March sixth, one of the checks was presented to defendant for payment and refused. On March eighth B. was married to E. The other check was presented and payment refused August 28, 1871. In an action to recover the amount so deposited, *held*, that as the money belonged to B. when deposited, although the deposit was in plaintiff's name, it still remained the property of B. and the payment to the committee was a legal payment which discharged defendant; that, assuming there was an equitable right in E. to the money arising out of the ante-nuptial contract, such equity could not be invoked against the bank, it having no notice of the same when it made payment. *Viets v. Un. Nat. Bk.* 563

2. While a check drawn by a depositor against a general bank account does not operate as an assignment of so much of the account, it authorizes the payee, or one to whom he has indorsed and delivered it, to make a demand, and a refusal of the bank to pay on presentation gives the drawer a right of action,

in case he has funds in bank to meet the check and the refusal was without his authority. *Id.*

- 3 The presumption is that a third person presenting a check payable to the order of and indorsed by the payee has authority to present it, at least so far as the drawer is concerned. *Id.*

4. The implied contract between a bank and its depositors is that it will pay the deposits when and in such sums as are demanded, the depositor having the election to make the whole payable at one time by demanding the whole, or in installments by demanding portions; and whenever a demand is made by presentation of a genuine check in the hands of a person entitled to receive the amount thereof, for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises and the statute of limitations begins to run as against the installment so made due and payable. *Id.*

5. Defendant had a department for the general clearance of contracts between its customers for the purchase and sale of gold, known as the "Clearing-House." Clearances were made each day by means of statements furnished by the dealers to defendant, of purchases and sales made by them; defendant acting simply as mutual agent for the parties. On a day when many members of the clearing-houses had failed to perform their contracts, and when there was great confusion in regard to them, O. & Co., plaintiff's assignor, presented two separate statements, one in the morning and one in the afternoon. In the first was an item of a transaction between O. & Co. and a firm which failed on the morning of that day. It was not usual to present more than one statement during the same day. When O. & Co. called upon defendant for the balances shown to be due that firm by the statements, they were advised by its president, that owing to the confusion in business, he could not tell how the

statements stood, and that the bank would only pay approximate balances, reserving a margin to secure defendant against failures. Defendant accordingly paid \$30,000 on the second statement, leaving \$10,000 unpaid thereon, and paid nothing on the first. In an action to recover the balances shown by the statements, *held*, that to entitle plaintiff to recover, it was necessary for it to show a clearance, by defendant, of the statements, and that a balance had been struck in favor of O. & Co., which made out a demand in the nature of an account stated; that the statements were to be taken and considered together as but one statement; but that if considered separately, there was no such clearance of either as bound defendant, and that plaintiff was not entitled to recover. *Nat. City Bk. v. N. Y. G. Ex. Bk.* 595

6. The only portion of the statement which was questioned was the item of the transaction with the insolvent firm; plaintiff claimed defendant was liable because of an omission on its part to notify O. & Co. of the failure; it appeared that O. & Co. had knowledge of the fact. *Held*, that, having such knowledge, the fact that they were not notified thereof by defendant was immaterial. *Id.*

See NATIONAL BANKS.
SAVINGS BANKS.

BANKRUPTCY.

Where the answer in an action was a general denial, and defendant on the trial offered to prove that after the commencement of the action plaintiff was adjudged a bankrupt and the cause of action passed to his assignee, which offer was rejected, *held* no error. *Styles v. Fuller.* 622

BEGGARS.

See DISORDERLY PERSONS.

BENEVOLENT, ETC., ASSOCIATIONS.

1. The section of the Penal Code (§ 291), authorizing and directing the arrest of children found begging, etc., and their commitment "to any charitable, reformatory or other institution authorized by law to receive and take charge of minors," does not repeal, or, as to commitments under said act to the New York Catholic Protectory, dispense with the provisions of the charter of said protectory (Chap. 448, Laws of 1863), or of the Consolidation Act (§ 1618 *et seq.*, chap. 410, Laws of 1882) requiring notice of the commitment to be given to the parents, guardian, etc., of a child so committed, and giving the parents or guardian an opportunity to be heard. *People, ex rel. Van Heck, v. N. Y. Catholic Protectory.* 195

2. *It seems* the section simply means that the magistrate or court before whom the child is brought, knowing the authority of the different institutions to receive and retain minors, and the limitations upon that authority, may select from among them the one he deems most fitting, and the one so selected takes and holds the child for the time, in the manner and under the regulations prescribed by its fundamental law. *Id.*

3. Where, therefore, a boy nine years of age was committed for begging to said protectory, to remain under its guardianship "until therefrom discharged in manner prescribed by law," no notice of the commitment having been given to the father of the child, and upon returns to a writ of *certiorari* and to a writ of *habeas corpus* to inquire into the cause of the commitment, which writs were issued more than twenty days after the commitment, the boy was discharged. *Held* no error. *Id.*

BILL OF LADING.

1. A consignee, who is owner of the consigned cargo, is liable to the

owner or master of the vessel for damages in the nature of demurrage, for unreasonable delay in discharging the cargo after arrival, although the bill of lading contains no stipulation as to demurrage, and prescribes no time within which the cargo shall be discharged. *Scholl v. A. & R. I. & S. Co.* 62

2. By a bill of lading of a cargo of coal, the carrier was to discharge the cargo at the port of destination. On arrival he reported to the defendant, the consignee and owner of the coal, and requested to be discharged, offering to do the shoveling of the coal if defendant would provide for taking it away; this it declined to do, insisting that plaintiff should take his turn at the wharf, and he was detained some seven days over the customary time for discharging such cargo. In an action to recover demurrage, *held*, that there was in effect an offer to perform on the part of plaintiff, and that it was a question of fact to be determined upon all the circumstances whether there was unreasonable delay on the part of defendant in discharging. *Id.*

BILLS, NOTES AND CHECKS.

1. A *bona fide* holder for value of a bill of exchange before acceptance is not required to pay an additional consideration to the drawee for his acceptance, in order to enforce it against him. *Heuvertmaitte v. Morris.* 63
2. The bill itself implies a representation by the drawer that the drawee is in funds to meet it, and the contract of the former is that the latter will accept and pay according to the terms of the bill; the subsequent acceptance constitutes an admission of the truth of the representation, which the drawee and acceptor is not thereafter allowed to retract. *Id.*
3. R. who resided at Rivas, in the State of Nicaragua, having collected a claim as agent for plaintiffs, who resided at Panama, sent

to them a draft for the amount, less cost of collection and exchange drawn by him on defendant at New York; this draft was received and accepted by plaintiffs in lieu of the moneys collected, and was remitted to New York; it was accepted by defendant, but when presented for payment it was refused. In an action upon the draft, *held*, that plaintiffs were *bona fide* holders for value, that the funds collected by R. remained their property, until by their acceptance of the draft they consented to and approved of that mode of transmission, and simultaneously with such acceptance the title to the funds passed to R.; that until such acceptance the conventional relation of debtor and creditor did not exist between R. and plaintiffs, and then those relations were governed by the liabilities existing by force of the draft alone; and that defendant was precluded by his acceptance from showing that it was without consideration and was induced by fraud on the part of the drawer.

Id.

4. Where a member of a firm, who had charge of its financial business, took up firm notes by giving in exchange therefor notes of a third person, indorsed by him in the firm name, which indorsement was without the knowledge of his partner,—*Held*, that the indorsement was within the authority of the partner making it; and that the firm was liable thereon. *Steuben Co. Bk. v. Alberger.* 202

5. Where a married woman, in 1879, voluntarily gave her promissory note for the amount of a claim against her husband, without any request on his part that she should become security for him, and without any consideration, either by way of a transfer of the claim to her or otherwise, and, in an action upon the note, there was no allegation or finding that she had any separate estate; *held*, that want of consideration was a good defense, although plaintiff was a *bona fide* purchaser for value, and although by the terms of the note the same

was made a charge on defendant's separate estate. *Linderman v. Farquharson.* 434

6. The provision of the Code of Civil Procedure (§ 1778), providing that in an action against a foreign or domestic corporation upon "a promissory note or other evidence of debt, for the absolute payment of money," the plaintiff may take judgment as in case of default, unless defendant serves with its answer or demurrer a copy of an order directing the issue to be tried, etc., applies to a municipal corporation; and this, although by its charter it is authorized to sue and be sued, to complain and defend. Such a provision in its charter confers no special right not common to corporations in general. *Moran v. L. I. City.* 489

7. Where to a promise to accept a bill of exchange is attached a condition precedent, which is a substantive part of the promise, and is so coupled with it as to show that the promisor did not intend to bind himself, except on compliance with the condition, this is not an unconditional promise to accept within the statute (1 R. S. 763, §§ 6, 8) such as will support an action against the promisor as acceptor. *Ger. Nat. Bk. v. Taaks.* 442

8. Defendants' firm, doing business in the city of New York, wrote a letter to B. & Co., a firm doing business in New Orleans, which contained this clause: "We are ready to pay your sight drafts on us which you advise us as having been drawn against particularly described shipments to the extent of \$50,000 on account of subsequent remittances." Plaintiff in reliance upon this letter, purchased of B. & Co. two sight drafts, drawn by that firm upon defendants. They were not accompanied by bills of lading or any advices of shipments, and no such advices were sent to defendants. Defendants refused to pay the drafts. In an action thereon, *held*, that it could not be sustained either as an action upon an acceptance, because the promise was conditional, nor as an action upon the

letter, treating it as a general letter of credit, because the condition upon which the liability depended was not performed; that while the letter did not contemplate that drafts were to be accompanied by bills of lading, or were only to be drawn after shipment had been fully completed, the promise was limited to the acceptance of such uncovered drafts as should be drawn on the credit of specific shipments in progress but not completed, of which defendants should be particularly advised before the drafts were presented for payment.

Id.

9. An administrator or executor who makes, indorses or accepts negotiable paper is personally liable thereon, although he adds to his signature the name of his office; he cannot bind the assets of the deceased by his contracts. *Schmittler v. Simon*. 554

10. The mere mention of a fund in a draft does not necessarily deprive it of the character of negotiable paper; it is only where there is a direction, express or implied, to pay it from the fund, and not otherwise, that it will have that effect.

Id.

11. A draft drawn upon an executor of the estate of the mother of the drawer contained an absolute direction to pay a fixed sum at a specified date, with interest to the payee or order, then followed these words, "and charge the amount against me, and of my mother's estate" "The draft was accepted by the executor, the word "executor" being added to his signature. In an action upon the acceptance, *held*, that the reference in the draft to the estate was not a direction to pay out of it, but it was simply referred to as a means of reimbursement; that the instrument was valid as a bill of exchange, and that the defendant was liable absolutely and individually. *Id.*

12. While a check drawn by a depositor against a general bank account does not operate as an assignment of so much of the

account, it authorizes the payee, or one to whom he has indorsed and delivered it, to make a demand, and a refusal of the bank to pay on presentation gives the drawer a right of action, in case he has funds in bank to meet the check and the refusal was without his authority. *Viets v. Un. Nat. Bk.* 563

13. The presumption is that a third person presenting a check payable to the order of and indorsed by the payee has authority to present it, at least so far as the drawer is concerned. *Id.*

14. The implied contract between a bank and its depositors is that it will pay the deposits when and in such sums as are demanded, the depositor having the election to make the whole payable at one time by demanding the whole, or in installments by demanding portions; and whenever a demand is made by presentation of a genuine check in the hands of a person entitled to receive the amount thereof, for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises, and the statute of limitations begins to run as against the installment so made due and payable. *Id.*

BOARD OF SUPERVISORS.

See SUPERVISORS.

BONA FIDE HOLDER.

1. A *bona fide* holder for value of a bill of exchange before acceptance is not required to pay an additional consideration to the drawee for his acceptance, in order to enforce it against him. *Heuertemette v. Morris*. 63
2. R. who resided at Rivas in the State of Nicaragua, having collected a claim as agent for plaintiffs who resided at Panama, sent to them a draft for the amount, less cost of collection and exchange, drawn by him on defendant at New York,

this draft was received and accepted by plaintiffs in lieu of the moneys collected, and was remitted to New York; it was accepted by defendant, but when presented for payment it was refused. In an action upon the draft, *held*, that plaintiffs were *bona fide* holders for value; that the funds collected by R. remained their property, until by their acceptance of the draft they consented to and approved of that mode of transmission, and simultaneously with such acceptance the title to the funds passed to R.; that until such acceptance the conventional relation of debtor and creditor did not exist between R. and plaintiffs, and then those relations were governed by the liabilities existing by force of the draft alone; and that defendant was precluded by his acceptance from showing that it was without consideration and was induced by fraud on the part of the drawer. *Id.*

3. *It seems* the rule that a trustee may not purchase or deal in the trust property in his own behalf does not render such a purchase void *ab origine*, but voidable only, and at the instance of the *cestui que trust* or of a party who has acquired the rights which belong to one in that relation. The title of a subsequent *bona fide* purchaser for value and without notice, when there is nothing on the record to show that his grantors had not a perfect right to convey, cannot be impeached, even in equity; he takes the land freed from the trust. *Harrington v. Erie Co. Sogs. Bk.* 257

4. When a married woman, in 1870, voluntarily gave her promissory note for the amount of a claim against her husband, without any request on his part that she should become security for him, and without any consideration, either by way of a transfer of the claim to her or otherwise, and, in an action upon the note, there was no allegation or finding that she had any separate estate: *held*, that want of consideration was a good defense, although plaintiff was a *bona fide* purchaser for value, and although by the terms of the note the same

was made a charge on defendant's separate estate. *Linderman v. Farquharson.* 434

BONDS.

See TOWN BONDING.

BOUNDARIES.

The description clause in a deed is to be so construed if possible as to carry out the intent of the parties; for this purpose false particulars in the description are to be rejected and less material points subordinated to the more certain and material ones when there is inconsistency between them; thus monuments generally control courses and distances. *Masten v. Olcott.* 153

BROOKLYN (CITY OF)

1. Plaintiff owned a lot in the city of B., bounded easterly by the water-line of the East river, and southerly by the central line of J. street, which street terminated at said water-line. A wharf had been built in front of his lot, extending to the center of said street, which plaintiff maintained, receiving wharfage from all persons using the same. The city authorities built a pier at the end of the street, shutting off from the water that portion of plaintiff's wharf in front of his half of the street. In an action to recover damages, *held*, that the erection of the pier was a wrongful interference with plaintiff's rights, and rendered the city liable; that the pier was to be considered as an accretion, and so much of it as was in front of his half of the street became his; also, the plaintiff was entitled to recover, as damages, the wharfage received by the city from that portion of the pier in front of his land; that defendant, having wrongfully collected the wharfage, was not entitled to any allowance for expenses incurred in collecting the same, or for the cost of building the wrongful structure.

- or keeping it in repair. *Steers v. City of Brooklyn*. 51
2. The authority conferred upon the city of Brooklyn by the charter of 1873 (Subd. 5, § 13, chap. 863, Laws of 1873), to establish and maintain public baths in said city, carried with it, as a necessary incident, power to designate and procure a proper place for the location of such a bath. *Poillon v. City of Brooklyn*. 132
3. Where the city placed a public bath at plaintiffs' pier without their authority or consent,—*Held*, that the city was liable to pay the value of the use of the pier; and that the provisions of said charter requiring contracts for work, materials, and improvements to be made with the lowest bidder, etc., and declaring that "no debt or obligation of any kind shall be created by the common council against the city except by ordinance or resolution," had no application. *Id*
4. Commissioners of sewage and assessment of the city of Brooklyn, in pursuance of the authority given them by statute (Chap. 521, Laws of 1857; chap. 136, Laws of 1861), established a drainage district, not theretofore drained, over the lands of plaintiff, and a plan of drainage which contemplated the construction of a main sewer into which lateral sewers to be constructed from time to time should empty. The main sewer was built in 1863, and subsequently various lateral sewers. / Soon after the completion of the main sewer, actual use demonstrated that it was insufficient to carry off the sewage turned into it, and at times this was forced through the man-holes and inundated plaintiff's premises, inflicting serious injury. These inundations increased in frequency as new lateral sewers were connected with the main trunk, and became well known to the municipal officers. Notwithstanding this the city continued to build and attach lateral sewers, increasing from year to year the evil produced by the defects in the original plan. In an action to recover damages, *held*, that the city was liable; that having by the exercise of its power created a private nuisance on plaintiff's premises, it incurred a duty of adopting such measures as should abate the nuisance, and having the power to perform it, its omission to do so renders it liable. *Seifert v. City of Brooklyn*. 136
5. A turnpike road was laid out running east and west across the land of N. in the city of Brooklyn; subsequently the city purchased of the turnpike company a portion of said road, "for a public street," which was thereafter used as a street. The expense of the purchase was assessed upon the adjoining land. N. deeded to S. the land south of the street, bounding it on the north by the south line of the street. S. laid it out into city lots; one of these he deeded to defendant. Of those adjoining on the east, plaintiff became the owner. The commissioners appointed under the act of 1835 (Chap. 132, Laws of 1835) to lay out the streets of the city, with authority to close any street or part thereof, "theretofore laid out and not approved by the mayor and common council of said city" determined to close said street. The proceedings of the commissioners were validated and confirmed in 1839 (Chap. 41, Laws of 1839); subsequently buildings were erected east of defendant's lot, which covered the land formerly occupied by the street, except a passage-way four feet wide, south of the center of the street. Plaintiff having obtained a conveyance of this strip from the executors of N., and from the city, built a fence across it, which defendant, claiming a right of way, tore down. Defendant had access to her lot by a passage-way twelve feet wide, to a street on the west. In an action to restrain defendant from interfering with plaintiff's occupation, *held*, that whether the turnpike company owned the fee or an easement, plaintiff acquired the fee either by the deed from the city or from N.'s executors;

that the city, with the authority of the legislature, could close the street, and so far as the *locus in quo* is concerned, could do so without compensation to defendant, and could sell and convey the same; that the street was legally closed; that the description in the deed from N. to S., bounding the land conveyed by the south line of the street, conveyed no private easement but merely recognized an existing public one; that conceding the city was bound to leave open a way by which access could be had to defendant's lot, it was not required to leave more than one; it might choose which of the two to leave, and when it conveyed to plaintiff it made its choice, and plaintiff was entitled to close the one so conveyed. *Kings Co. F. Ins. Co. v. Stevens.* 411

BURDEN OF PROOF.

1. In an action to restrain the sale of land for non-payment of an assessment for a local improvement and to set aside the assessment because of alleged invalidity in the proceedings, the burden is upon plaintiff to establish the invalidity complained of. There is no presumption in such an action that municipal authorities have acted illegally or that conditions precedent have not been performed. *Tingue v. Village of Port Chester.* 294
2. Where, therefore, in an action to restrain the sale of plaintiff's lot in the village of Port Chester, and to set aside an assessment thereon for grading a street, it appeared that the charter of the village (§ 4, tit. 5, chap. 818, Laws of 1868) requires the petition for laying out a street to be signed by persons owning land on the line thereof, but does not require the fact of such ownership to be stated in the petition,—*Held*, the fact that the petition for opening the street in question did not show on its face that the persons signing it were such owners did not tend to

negative their ownership; and, in the absence of other proof, that the invalidity of the proceedings in this respect was not established. *Id.*

CASES REVERSED, DISTINGUISHED, ETC.

- Bartlett v. Stinton* (L. R., 1 C. P. 483), distinguished. *Chapin v. Foster.* 4
- Schoenwald v. Metropolitan Bk.* (57 N. Y. 418), distinguished *Smith v. B'klyn Sogs. Bk.* 63
- Heuertematt v. Morris* (28 Hun, 77), reversed. *Heuertematt v. Morris.* 63
- Lamb v. Walker* (L. R., 3 Q. B. Div. 389), disapproved. *Uline v. N. Y. C. & H. R. R. Co.* 111
- Henderson v. N. Y. C. R. R. Co.* (78 N. Y. 423), distinguished. *Uline v. N. Y. C. & H. R. R. Co.* 121
- City of North Vernon v. Voegler* (2 N. E. Rep. 821), distinguished and questioned. *Uline v. N. Y. C. & H. R. R. Co.* 124
- Pierson v. People* (79 N. Y. 424), distinguished. *People v. Murphy.* 129
- Mills v. City of B'klyn* (33 N. Y. 490), distinguished. *Seifert v. City of B'klyn.* 141
- Smith v. Mayor, etc.* (66 N. Y. 295), distinguished. *Seifert v. City of B'klyn* 141
- Wilson v. Mayor, etc.* (1 Den. 595), distinguished. *Seifert v. City of B'klyn.* 141
- Lynch v. Mayor, etc.* (76 N. Y. 60), distinguished. *Seifert v. City of B'klyn.* 142
- Clifford v. Dam* (81 N. Y. 52), distinguished *Wolf v. Kilpatrick.* 149
- Anderson v. Dickie* (1 Rob. 238), distinguished. *Wolf v. Kilpatrick.* 149

- Dygert v. Schenck* (23 Wend. 445), distinguished. *Wolf v. Kilpatrick*. 149
- Congreve v. Morgan* (18 N. Y. 84), distinguished. *Wolf v. Kilpatrick*. 149
- Davenport v. Ruckman* (37 N. Y. 568), distinguished. *Wolf v. Kilpatrick*. 149
- Swords v. Edgar* (59 N. Y. 28), distinguished. *Wolf v. Kilpatrick*. 151
- In re Deering* (85 N. Y. 1), distinguished. *In re Knaust*. 193
- Taylor v. Bradley* (39 N. Y. 129), limited. *Wakeman v. W. & W. Manuf. Co.* 211
- Hove Machine Co. v. Bryson* (44 Iowa, 159), disapproved. *Wakeman v. W. & W. Manuf. Co.* 215
- Mitchell v. Read* (84 N. Y. 556), distinguished. *Wakeman v. W. & W. Manuf. Co.* 218
- Billings v. Billings* (31 Hun, 65), reversed. *Billings v. Russell*. 226
- Auburn Ex. Bk. v. Fitch* (48 Barb. 344), distinguished. *Billings v. Russell*. 231
- Archer v. O'Brien* (7 Hun, 146), distinguished. *Billings v. Russell*. 231
- Jewell v. Noteware* (30 Hun, 192), distinguished. *Billings v. Russell*. 232
- Bedell v. Chase* (34 N. Y. 386), distinguished. *Billings v. Russell*. 232
- Freory v. People* (2 Keyes, 425), distinguished. *Hildreth v. City of Troy*. 240
- Ferrie v. People* (35 N. Y. 125), distinguished. *Hildreth v. City of Troy*. 240
- People v. Ransom* (7 Wend. 417), distinguished. *Hildreth v. City of Troy*. 240
- Kelly v. Sheehan* (76 N. Y. 325), distinguished. *Evans v. Backer*. 291
- Kilmer v. Hathorn* (78 N. Y. 328), distinguished. *Evans v. Backer*. 293
- Rae v. Beach* (76 N. Y. 164), distinguished. *Evans v. Backer*. 293
- People, ex rel. N. Y. & H. R. R. Co., v. Com'rs of Taxes, etc.* (28 Hun, 687), reversed. *People, ex rel. N. Y. & H. R. R. Co., v. Com'rs of Taxes, etc.* 322
- In re Moore* (67 N. Y. 555), distinguished. *People, ex rel. N. Y. & H. R. R. Co., v. Com'rs of Taxes, etc.* 325
- In re N. Y. & H. R. R. Co.* (98 N. Y. 12), distinguished. *People, ex rel. N. Y. & H. R. R. Co., v. Com'rs of Taxes, etc.* 325
- People v. A. & V. R. R. Co.* (77 N. Y. 232), distinguished. *White's Bk. of Buffalo v. Farthing*. 348
- Osterhoudt v. Supra., etc.* (98 N. Y. 289), distinguished. *White's Bk. of Buffalo v. Farthing*. 348
- Clark v. Dillon* (97 N. Y. 370), distinguished. *Griffin v. L. I. E. R. Co.* 351
- Pease v. D., L. & W. R. R. Co.* (15 Daly, 850), reversed. *Pease v. D., L. & W. R. R. Co.* 367
- Story v. N. Y. E. R. R. Co.* (90 N. Y. 122), distinguished. *Kings Co. F. Ins. Co. v. Stevens*. 417
- Moran v. L. I. City* (38 Hun, 123), reversed. *Moran v. L. I. City*. 439
- Germania Nat. Bk. v. Tuaks* (31 Hun, 280), reversed. *Germania Nat. Bk. v. Tuaks*. 442
- Wagstaff v. Lowerre* (23 Barb. 209), questioned. *Phœnix v. Livingston*. 456
- In re DePeyster* (4 Sandf. Ch. 511), distinguished. *Phœnix v. Livingston*. 457

- McWhorter v. Benson* (1 Hopk. 28), distinguished. *Phoenix v. Livingston*. 457
- Snowden v. Guion* (18 J. & S. 137), reversed. *Snowden v. Guion*. 458
- Smith v. Boyd* (10 Daly, 149), reversed. *Smith v. Boyd*. 472
- Kennedy v. N. Y. L. Ins. & T. Co.* (33 Hun, 35), reversed. *Kennedy v. N. Y. L. Ins. & T. Co.* 487
- Carleton v. Carleton* (85 N. Y. 313), distinguished. *Kennedy v. N. Y. L. Ins. & T. Co.* 488
- People, ex rel. Green, v. Smith* (55 N. Y. 185), distinguished. *Hills v. Peekskill Savings Bk.* 493
- Metzger v. A. & A. R. R. Co.* (79 N. Y. 171), distinguished. *Hills v. Peekskill Svs. Bk.* 494
- Royer Wheel Co. v. Fielding* (31 Hun, 274), distinguished. *Royer Wheel Co. v. Fielding*. 504
- Merrill v. Village of Port Chester* (71 N. Y. 309), distinguished. *People, ex rel. Swinburne, v. Nolan*. 546
- People, ex rel. Williams, v. McKenney* (53 N. Y. 374), distinguished. *People, ex rel. Swinburne, v. Nolan*. 546
- Tooker v. Arnoux* (76 N. Y. 397), distinguished. *Schmittler v. Simon*. 562
- Cross v. Beard* (36 N. Y. 85), distinguished. *Scholl v. A. & R. Iron and Steel Co.* 605

CAUSE OF ACTION.

1. Where an assessment for a local improvement is valid upon its face, but is in fact void because the assessors had no jurisdiction to impose it, an action may be maintained to recover back money involuntarily paid in satisfaction thereof without first having the assessment set aside or vacated. *Bruecher v. Village of Port Chester*. 240
2. Defendant, for the purpose of removing certain cases of merchandise from his store in the city of New York, placed a pair of skids from a truck across the sidewalk to the steps of the store; after they had been there about three minutes plaintiff came along the sidewalk and seeing the skids attempted to pass around them by the steps, and in so doing slipped upon the steps and was injured. In an action to recover damages, held, that defendant owed no duty to the plaintiff to see that the steps were in an absolutely safe condition for travel; and that she was not entitled to recover. *Welsh v. Wilson*. 254
3. A policy of fire insurance required proofs of loss to be made within thirty days after a fire, and provided that the loss should be payable sixty days after notice thereof and proofs of loss have been received by the company; it also provided that in case of differences in regard to the loss or damage they should be submitted to arbitrators. In an action upon the policy, held, that the words "proofs of loss," in the clause in regard to payment, referred to the proofs to be furnished within thirty days, and that an action brought three days after an award by arbitrators, appointed as provided by the policy, but more than sixty days after proofs of loss were served, was not prematurely brought. *Clover v. Greenwich Ins. Co.* 277
4. It is essential to the legal statement in a complaint of a cause of action *ex contractu*, that it should allege an existing contract and the performance by plaintiff of such conditions precedent as are thereby provided, or a tender of performance, or some adequate excuse for non-performance. *Bogardus v. N. Y. L. Ins. Co.* 328
5. Such an excuse exists only when the defendant has prevented performance by plaintiff, or has himself wholly refused to perform, or has wholly disabled himself from completing a substantial performance. *Id.*

6. The failure of the defendant to perform some of the obligations of the contract which go to a part only of the consideration, when the breach may be paid for in damages, is not sufficient. *Id.*

7. While the legislature may abolish an office, diminish the salary or change the mode of compensation during the term of an incumbent, subject only to constitutional restrictions, yet within these limits the right to an office carries with it the right to the emoluments, and an officer unlawfully dispossessed of his office may, upon his reinstatement therein, maintain an action against an intruder, to recover the damages resulting from the intrusion; as a general rule, the salary or fees of the office received by the intruder are the measure of damages. *Nichols v. MacLean.* 526

CERTIFICATE

On the same paper, and following the signatures to an assignment for the benefit of creditors, was written a notary's certificate of acknowledgment. It bore the same date as the assignment, and named as the persons acknowledging the ones who apparently executed the assignment. It stated that the persons named were to the notary known "to be the individuals described in, and who executed *the same.*" *Held*, that the words "the same" referred to the instrument to which the certificate was appended, and sufficiently identified it; and that the certificate showed a due acknowledgment of the instrument. *Smith v. Boyd.* 472

CERTIORARI

For the purposes of an appeal, a judgment in proceedings by *certiorari* to review an assessment under the act of 1880 (Chap. 269, Laws of 1880) is to be considered as an order, and an appeal to this court must be taken within the time prescribed for appeals from

orders, *i. e.*, sixty days. *People, ex rel. W. V. R. R. Co., v. Keator.* 610

CHALLENGE (OF JURORS).

— *Insufficiency of facts to show defect in drawing jury.*

See People v. Kiernan. (Mem.) 618

— *When challenge for cause, on criminal trial properly overruled.*

See People v. Otto. (Mem.) 690

See JURY.

CHATTEL MORTGAGE.

Plaintiff purchased of defendant certain personal property covered by a chattel mortgage; the latter gave a bill of sale by which he covenanted "to warrant and defend the sale," and a writing by which he certified that the chattel mortgage would thereafter be paid by him; not having been paid it was foreclosed and the property was purchased by N. for \$700, the amount due on the mortgage. N. claimed the property, and plaintiff paid him \$1,000 therefor. In an action to recover damages for the breach of defendant's agreements plaintiff recovered the amount due on the mortgage. *Held* no error; that no actual eviction was necessary to sustain the action; that as he could not withhold the property from the purchaser without becoming a wrong-doer, his submission, although peaceable, was not voluntary. *Cahill v. Smith.* 355

See MORTGAGE.

CHECKS.

See BILLS, NOTES AND CHECKS.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. *It seems* that a judgment for plaintiff in replevin may be entered although the jury has not assessed any damages or found the

value of the property; the judgment, however, can only be enforced by execution, not by punishment for contempt. (Code of Civ. Pro., §§ 1780, 1781.) *Hammond v. Morgan.* 179

2. A receiver of an insolvent national bank acquires no right to property in the custody of the bank, which it does not own, as against the owner, and the provision of the United States Revised Statutes (§ 5242), prohibiting the issuing of an attachment, injunction or execution against such a corporation before final judgment, was not intended to protect the receiver's custody as against such owner. *Corn E. Bk. v. Blye.* 303

3. Accordingly *held*, that said provision did not prohibit the issuing, in an action against the receiver of a national bank to recover possession of personal property, of a requisition directing the sheriff to take into his possession the property in question; that the receiver, if he desired to retain possession of the property during the litigation, could only do so by giving the security required, the same as other defendants in such an action. *Id.*

4. Where an action to recover a chattel is based solely upon a wrongful detention, a general denial puts in issue, as well, plaintiffs' property in the chattel as the wrongful detention, and defendant under such a plea may show title in a stranger although he does not connect himself with such title. *Griffin v. L. I. R. R. Co.* 348

5. Where an answer, after sufficiently admitting or denying certain allegations of the complaint, denies each and every allegation not thus admitted or denied, this is a good general denial. *Id.*

CLEARING HOUSE.

See BANKS AND BANKING.

CLINTON (VILLAGE OF).

1. The act of 1885 (Chap. 17, Laws SICKELS — VOL. LVI.

of 1885) entitled "An act for the relief of the village of Clinton," is not violative of the constitutional provision (State Const., art. 3, § 16) declaring that no private or local bill "shall embrace more than one subject and that shall be expressed in the title;" and said act was within the authority of the legislature and is valid. *Bd. Water Com'rs v. Dwight.* 9

2. Where prior to the passage of said act proceedings had been commenced by the board of water commissioners of said village under the act of 1875 (Chap. 181, Laws of 1875), authorizing villages to furnish pure and wholesome water to their inhabitants, and an application for the appointment of commissioners to appraise damages had been denied at Special Term, on the ground of non-compliance with the requirements of the act last mentioned,—*Held*, that the act of 1885 was properly before the General Term, on appeal from the Special Term order, and rendered a decision upon the original proceedings unimportant; and that, therefore, a reversal of the order of Special Term with leave to make "application to the Special Term for the appointment of commissioners," was proper. *Id.*

CODES

See CODE OF CIVIL PROCEDURE.
CODE OF CRIMINAL PROCEDURE.
CODE OF REMEDIAL JUSTICE.
PENAL CODE.

CODE OF CIVIL PROCEDURE.

- § 8. *People, ex rel., v. Oyer & Terminer.* 245
- §§ 85, 86. *In re Flushing Avenue.* 678
- § 185. *Kennedy v. N. Y. L. I. & T. Co.* 487
- § 191. *Lane v. Wheeler.* 17
- § 414. *Viets v. Un. Nat. Bank.* 593
- § 452. *White's Bank v. Furthing.* 344
- § 544. *People, ex rel., v. Nolan.* 539
- § 549. *Chapin v. Foster.* 1
- §§ 635, 636. *Thorington v. Merrick.* 5
- § 829. *Simmons v. Havens.* 427
- § 884. *People v. Murphy.* 126

§§ 870, 876. <i>M. N. Bank v. Sheehan.</i>	176
§§ 968, 972. <i>Hammond v. Morgan.</i>	179
§§ 1035 <i>et seq.</i> <i>People v. Kiernan.</i> (<i>Mem.</i>)	618
§ 1180. <i>Hildreth v. City of Troy.</i>	234
1225. <i>Hammond v. Morgan.</i>	179
1309. <i>Evans v. Backer.</i>	289
§§ 1730, 1731. <i>Hammond v. Morgan.</i>	179
§ 1778. <i>Moran v. Long Island City.</i>	439
§§ 1948, 1953, 1984. <i>People, ex rel., v. Nolan.</i>	439
2747. <i>People, ex rel., v. Chapin.</i>	682
3239. <i>People, ex rel., v. Com'rs.</i>	651
3320. <i>U. S. T. Co. v. N. Y., W. S. & B. R. Co..</i>	478

CODE OF CRIMINAL PROCEDURE.

§§ 376, 380. <i>People v. Otto.</i> (<i>Mem.</i>)	690
§ 392. <i>People v. Murphy</i>	126
§ 527. <i>People v. Donovan.</i>	632

CODE OF REMEDIAL JUSTICE.

- Proceedings taken during the twenty days that the Code of Remedial Justice was in force were valid if taken under that Code, or under the Code of Procedure, so far as any action was based upon them prior to September 1, 1877, when the Code of Civil Procedure went into effect. *Denman v. McGuire.*

161

COMMISSIONS.

1. The will of W., after directing the payment of debts and expenses, named six persons as "executors of and trustees under" it. A series of separate trust estates were constituted, running for the lives of the specified beneficiaries. Some of these required specific sums to be set apart, others provided for the severance of the trust estates from the general assets, and their management by five of the six persons so named, holding as trustees. A large portion of the trust estate consisted of real estate, and provision was made for partition.

Authority was conferred upon the trustees to lease and to sell certain portions, and general authority for the management of the land. The trustees were also empowered, in their discretion, to commit, by revocable power of attorney, the management of certain of the trust estates to the beneficiary. The accounts of the executors as such were settled, leaving in their hands only the trust estates, which were severed from the general assets, and thereafter separate accounts were kept with each beneficiary. *Held*, that by the will the testator contemplated and provided for two separate duties to be performed by his representatives, first as executors, and thereafter as trustees, and that they were entitled to commissions in both capacities, but that they were not entitled to commissions on the value of the real estate unsold at the termination of the trusts. *Phoenix v. Livingston.*

451

2. The act of 1883 (Chap. 873, Laws of 1883), in relation to receivers of corporations, including the second section thereof, in reference to receiver's fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in said section. *U. S. Trust Co. v. N. Y., W. S. & B. R. Co.*

478

3. The allowance of commissions to such a receiver is governed by the provision of the Code of Civil Procedure (§ 3320), providing for the allowance by the court or the judge where not "otherwise specially prescribed by statute." *Id.*

COMMON CARRIER.

1. Where a passenger on a railroad, by an illegal refusal to pay fare, renders it the duty of the conductor in enforcing the reasonable rules and regulations of the company to eject him from the cars, and the refusal and resistance of the passenger continues until after force has been required and ap-

plied to remove him, he cannot, by offering to pay fare, make the continuance of the process of expulsion unlawful, and, although he is ejected, after an offer to pay fare, at a place where the train ordinarily stops and receives passengers, this does not render the railroad company liable. *Pease v. D., L. & W. R. R. Co.* 367

2. A carrier of passengers is not required unconditionally to accept all persons who offer themselves for transportation and tender fare; he may lawfully decline to receive or carry those who refuse to conform to his reasonable rules, after knowledge of the same, or may after such refusal lawfully eject those who have been received. *Id.*
3. A consignee, who is owner of the consigned cargo, is liable to the owner or master of the vessel for damages in the nature of demurrage, for unreasonable delay in discharging the cargo after arrival, although the bill of lading contains no stipulation as to demurrage, and prescribes no time within which the cargo shall be discharged. *Scholl v. A. & R. I. & S. Co.* 602
4. By a bill of lading of a cargo of coal, the carrier was to discharge the cargo at the port of destination. On arrival he reported to the defendant, the consignee and owner of the coal, and requested to be discharged, offering to do the shoveling of the coal if defendant would provide for taking it away; this it declined to do, insisting that plaintiff should take his turn at the wharf, and he was detained some seven days over the customary time for discharging such cargo. In an action to recover demurrage, *held*, that there was in effect an offer to perform on the part of plaintiff, and that it was a question of fact to be determined upon all the circumstances whether there was unreasonable delay on the part of defendant in discharging. *Id.*

See RAILROAD CORPORATIONS.

COMPROMISE

1. In an action by a tax payer of the town of A., to have certain bonds issued by said town adjudged illegal and void, it appeared that the town, acting in supposed accordance with statutory provisions (Chap. 907, Laws of 1869, as amended by chap. 925, Laws of 1871) issued its bonds to pay for stock of a railroad corporation, which passed into the hands of innocent holders. The bonds were claimed by the town to have been illegally issued, and so invalid. While suits were pending to enforce them, said town, under the act of 1890 (Chap. 148, Laws of 1890), authorizing it "to issue new bonds pursuant to the provisions of chapter 75, Laws of 1878," and its amendments, to the amount and extent of its bonded indebtedness, issued the bonds in question in exchange for, and to retire the outstanding bonds, the new bonds drawing a lower rate of interest than the old ones. Said town at the time had no other "bonded indebtedness" than the original bonds issued as above stated. *Held*, that the action was not maintainable; that the town having elected to compromise rather than to contest the validity of the old bonds, was estopped from thereafter questioning it. *Hills v. Peekskill Sogs. Bk.* 490
2. The defect alleged in the proceedings under which the original bonds were issued was that to the averment in the petition, that "the signers were a majority of the tax payers of the town, was not added the words 'not including those taxed for dogs or highway tax only.'" *Held*, that the defect did not render the bonds so absolutely void as matter of law, but that there might be reasonable question pending an adjudication; enough of doubt to justify the legislature in authorizing, and the town in effecting an amicable settlement. *Id.*

COMPTROLLER.

Where a person entitled to a leg-

acy or distributive share of a decedent's estate is unknown, and the money has been paid into the State treasury pursuant to the directions of the Code of Civil Procedure (§ 2747), it is not money of the State, or belonging to any of its funds, or funds under its management, within the meaning of the provision of the State Constitution (Art. 7, § 8), which prohibits the paying out of such moneys "except in pursuance of an appropriation by law," and upon compliance with the requirements of the Code and production of a certified copy of order directing payment of the legacy or distributive share to a claimant, it is the duty of the comptroller to draw his warrant therefor without such an appropriation. *People, ex rel. Evans, v. Chapin.* 682

CONDITIONS.

Where to a promise to accept a bill of exchange is attached a condition precedent, which is a substantive part of the promise, and is so coupled with it as to show that the promisor did not intend to bind himself except on compliance with the condition, this is not an unconditional promise to accept within the statute (1 R. S. 768, §§ 6, 8) such as will support an action against the promisor as acceptor. *Ger. Nat. Bk. v. Taaks.* 443

— *In action in nature of quo warranto, it is no defense that relator has not taken oath of office or demanded possession. These are not conditions precedent to right to recover.*

See People, ex rel., v. Nolan 540

CONFLICT OF LAWS.

In July, 1944, defendant, who was then residing in Toronto, Canada, married K., in this State and lived with him here as his wife until January, 1860, when she left him and returned to Toronto, where she continued to reside until 1865. K. removed to, and became a resident of Ohio, and in 1864, after a residence there of more than a year,

he commenced an action in that State for divorce on the ground that defendant had been willfully absent from him for more than three years. A copy of the petition and summons were mailed to defendant at Toronto, and were received by her. Notice of the filing of the petition, the purpose thereof, the time for hearing, and that depositions would be taken at Toronto at a time and place named, was duly published. Depositions were taken in pursuance of said notice, defendant being present but taking no part personally or by counsel. No other service was made upon defendant; the service made was, under the laws of Ohio, a legal service. A divorce was granted in 1864. By the terms of the decree, each party was "restored to the rights and privileges of unmarried persons." Defendant afterward married the plaintiff, and they lived together as husband and wife until 1880. Plaintiff, prior to his marriage, knew of defendant's former marriage and of the divorce proceedings, but not of the particular circumstances under which the decree of divorce was obtained. At the time of such marriage K. was and is still living in Ohio. In an action to have the marriage between the parties annulled, on the ground that defendant, at the time of such marriage, had a husband living, and that her former marriage was still in full force, *held* (MILLER, DANFORTH and FINCH, JJ., dissenting), that the Ohio court acquired no jurisdiction over the defendant and the decree of divorce was, as to her, inoperative and void; that, therefore, the marriage between her and plaintiff was illegal and void. *O'Dea v. O'Dea.* 23

CONSIGNOR AND CONSIGNEE.

A consignee, who is owner of the consigned cargo, is liable to the owner or master of the vessel for damages in the nature of demurrage, for unreasonable delay in discharging the cargo after arrival, although the bill of lading contains no stipulation as to demur

rage, and prescribes no time within which the cargo shall be discharged. *Scholl v. A. & R. I. & S. Co.* 602

CONSTITUTION.

1. A municipal corporation has no right, in the exercise of its power, to determine when, where and how to make improvements, to do so upon a plan which substantially involves the appropriation by it of the property of a citizen to a public use without making compensation therefor. *Seifert v. City of B'klyn.* 186

2. *It seems* that immunity from liability for the consequences following the exercise of judicial or discretionary power by a municipal corporation presupposes that the act performed may in some manner be lawfully authorized. Where the act is of such nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is insufficient as a protection. *Id.*

3. Where a person entitled to a legacy or distributive share of a decedent's estate is unknown, and the money has been paid into the State treasury pursuant to the directions of the Code of Civil Procedure (§ 2747), it is not money of the State, or belonging to any of its funds, or funds under its management within the meaning of the provision of the State Constitution (Art. 7, § 8), which prohibits the paying out of such moneys "except in pursuance of an appropriation by law" and upon compliance with the requirements of the Code and production of a certified copy of order directing payment of the legacy or distributive share to a claimant, it is the duty of the comptroller to draw his warrant therefor without such an appropriation. *People, ex rel. Evans, v. Chapin.* 682

CONSTITUTIONAL LAW.

1. The act of 1885 (Chap. 17, Laws

of 1885), entitled "An act for the relief of the village of Clinton," is not violative of the constitutional provision (State Const., art. 3, § 16), declaring that no private or local bill "shall embrace more than one subject and that shall be expressed in the title"; and said act was within the authority of the legislature and is valid. *Bd. Water Comrs. v. Dwight.* 9

2. Said act, although a local, is not a private one. *Id.*

3. The act of 1866 (Chap. 367, Laws of 1866), entitled "An act relative to the powers and duties of the commissioners of Central Park," is not violative of the constitutional requirement (State Const., art. 3, § 16), that a local or private bill shall embrace but one subject, which shall be expressed in the title. *In re Knaust.* 188

4. The provisions of the Code of Civil Procedure (§ 1778), providing that in an action against a foreign or domestic corporation upon "a promissory note or other evidence of debt, for the absolute payment of money," the plaintiff may take judgment as in case of default, unless defendant serves with its answer or demurrer a copy of an order directing the issue to be tried, etc., is constitutional. *Moran v. L. I. City.* 439

— Chapter 75, Laws of 1878, constitutional.
See *Hills v. P. S. Bank.* 490

— Chapter 277, Laws of 1878, amending charter of village of Port Chester, violative of constitutional provision (Art. 3, § 16), requiring that a local bill shall embrace but one subject, which shall be expressed in title.

See *Tingue v. Village of Port Chester.* 294

— When consideration of question as to constitutionality of law authorizing a local improvement properly refused on motion to vacate appointment of commissioners and party left to his remedy by action.

See *In re opening, etc., of Flushing Ave (Mem.)* 678

CONSTRUCTION.

The description clause in a deed is to be so construed if possible as to carry out the intent of the parties; for this purpose false particulars in the description are to be rejected and less material points subordinated to the more certain and material ones when there is inconsistency between them; thus monuments generally control courses and distances. *Masten v. Olcott.* 152

CONTEMPT.

1. An act which is not a civil or private contempt, and is not enumerated among criminal contempts (Code of Civ. Pro., § 8), is not a contempt, although it may be punishable as a misdemeanor. *People, ex rel. Munell, v. Ct. Oyer & Terminer.* 245

2. During the progress of the trial of an indictment for assault with intent to kill, one of the jurors went to the scene of the affray for the purpose of acquainting himself with the locality. For this act he was adjudged by the court guilty of contempt, and was committed therefor. *Held error.* *Id.*

3. The distinction between private or civil and public or criminal contempts pointed out. *Id.*

— *It seems a judgment in replevin where no damages have been assessed on value of property found can only be enforced by execution, not by punishment for contempt.*

Hammond v. Morgan. 179

CONTRACT.

1. A contract for the sale of goods may not be predicated on an offer which was modified or withdrawn before an unconditional acceptance. *Schenectady Stove Co. v. Holbrook.* 45

2. Under an offer of immediate sale, the buyer cannot extend the times

of payment, by postponing the time of delivery, without the vendor's consent. *Id.*

3. On August 16, 1879, plaintiff, in answer to a request from defendant's firm, gave by letter its prices for certain goods, with this statement, "this price only to hold good till thirtieth September." On September twenty-second defendants sent an order with directions, to have the goods ordered, put up and marked in a specified way, and sent in five or six shipments, at intervals of ten days or two weeks. In September, prior to the giving of the order, C., an agent of the plaintiff, had made to defendant a proposition, modifying slightly the written offer; plaintiff, on September twenty-fifth, wrote defendants, acknowledging receipt of order, giving their understanding of the terms proposed by C.; on September twenty-ninth, defendants sent another order, claiming, however, that the prices given by C. were less than as stated by plaintiff; plaintiff returned the order, with letter, stating it was beyond its power to accept. In an action to recover for the goods delivered under the first order, defendants set up as a counter-claim, damages for failure to fill the second order. *Held* untenable; that no contract was made for the sale of the goods specified in such order. *Id.*

4. The parties entered into a contract by which defendant agreed that, if plaintiffs should succeed in selling fifty of the defendant's sewing machines to one firm or party in Mexico, during a trip of their agent about to be made, for every fifty machines so sold they should have the sole agency for the sale of said machines in that locality, and defendant agreed to furnish the machines. Plaintiffs' agent made two sales of fifty machines to persons in different localities in Mexico, under an agreement that the purchaser should be the sole agent for the sale of the machines in that locality; one of the orders defendant filled, the other it refused, and refused to fill further orders

- from plaintiffs or their agents, and repudiated the contract. In an action to recover damages for breach of the contract, *held*, that plaintiffs were not confined to the damages sustained by reason of the refusal of the defendant to fill the orders actually given, but were entitled to recover such damages as they could show they had sustained by a total breach of the contract, *i. e.*, the value of the contract; not merely imaginary or speculative damages, but such as were reasonably certain, and such only as actually followed or might follow from such breach, such as a jury could determine approximately upon reasonable conjecture and probable estimates. *Wakeman v. W. & W. Mfg. Co.* 203
5. A person violating a contract should not be permitted entirely to escape liability because the amount of the damage he has caused is uncertain. *Id.*
6. Prospective profits, so far as they can properly be proved, and which would certainly have been realized but for defendant's default, are allowable as damages, although the amount is uncertain. *Id.*
7. The rule that damages which are contingent and uncertain cannot be recovered embraces only such as are not the certain result of the breach, not such as are the certain result but uncertain in amount. *Id.*
8. It is essential to the legal statement in a complaint of a cause of action *ex contractu*, that it should allege an existing contract and the performance by plaintiff of such conditions precedent as are thereby provided, or a tender of performance or some adequate excuse for non-performance. *Bogardus v. N. Y. L. Ins. Co.* 323
9. Such an excuse exists only when the defendant has prevented performance by plaintiff, or has himself wholly refused to perform, or has wholly disabled himself from completing a substantial performance. *Id.*
10. The failure of the defendant to perform some of the obligations of the contract which go to a part only of the consideration, when the breach may be paid for in damages, is not sufficient. *Id.*
11. A mere representation made during the pendency of negotiations for a contract is not actionable, even if untrue; it must appear to have been material and made under such circumstances as to show that it was intended as a warranty of the fact represented, and so constituting a contract. A mere allegation in a complaint, therefore, of a representation is not equivalent to an averment of warranty or contract. *Id.*
12. Plaintiff purchased of defendant certain personal property covered by a chattel mortgage; the latter gave a bill of sale by which he covenanted "to warrant and defend the sale," and a writing by which he certified that the chattel mortgage would thereafter be paid by him; not having been paid it was foreclosed and the property was purchased by N. for \$700, the amount due on the mortgage. N. claimed the property, and plaintiff paid him \$1,000 therefor. In an action to recover damages for the breach of defendant's agreements plaintiff recovered the amount due on the mortgage. *Held* no error; that no actual eviction was necessary to sustain the action; that as he could not withhold the property from the purchaser without becoming a wrong-doer, his submission, although peaceable, was not voluntary. *Cahill v. Smith.* 355
13. Defendant contracted to sell plaintiff ten car-loads of iron—" (C) Blooms"—to be delivered "as fast as they may be produced, small enough to meet the usual requirements of measure." Five car-loads were delivered. In an action to recover damages for non-delivery of the residue, *held*, the contract required, not simply that the blooms should be delivered as fast as they were actually produced, but that they should be produced in the ordinary opera-

- tions of defendant's forge, with reasonable diligence and by reasonable and proper efforts, and defendant was not authorized to stop the production from motives of economy or convenience. *Stewart v. Marvel.* 357
14. Evidence was offered on the part of plaintiffs and received under objection, that defendant stated, at the time the contract was made, that he could produce a car load of blooms for delivery every ten days. *Held* no error. *Id.*
15. The parties entered into a contract by which plaintiff agreed to alter certain boilers belonging to defendants, in a manner specified, the stipulated price for the work defendants agreed to pay as soon as they "are satisfied that the boilers as changed are a success." The work was completed within the time agreed upon, and defendants then began and thereafter continued the use of the boilers without objection or complaint. In an action to recover the contract-price defendants claimed that the question as to whether the work was a success was one for them alone to determine. *Held* untenable; and that a simple allegation of dissatisfaction, without a good reason therefor, was no defense. *Duplex S. B. Co. v. Garder.* 887
16. Under such a contract, that which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with. *Id.*
17. Prior to the passage of the Enabling Act of 1884 (Chap. 381, Laws of 1884) a married woman, who had no separate estate and was not engaged in any separate business, was incapable, by reason of her coverture, of making a contract. *Linderman v. Farquharson.* 434
18. Even where she had a separate estate, a promissory note made by her was open to the defense of want of consideration, although in the hands of a bona fide holder for value. *Id.*
19. Defendants' firm, doing business in the city of New York, wrote a letter to B. & Co., a firm doing business in New Orleans, which contained this clause "We are ready to pay your sight drafts on us which you advise us as having been drawn against particularly described shipments to the extent of \$50,000 on account of subsequent remittances." Plaintiff, in reliance upon this letter, purchased of B. & Co. two sight drafts, drawn by that firm upon defendants. They were not accompanied by bills of lading or any advices of shipments, and no such advices were sent to defendants. Defendants refused to pay the drafts. In an action thereon, *held*, that it could not be sustained either as an action upon an acceptance, because the promise was conditional, nor as an action upon the letter, treating it as a general letter of credit, because the condition upon which the liability depended was not performed; that while the letter did not contemplate that drafts were to be accompanied by bills of lading, or were only to be drawn after shipment had been fully completed, the promise was limited to the acceptance of such uncovered drafts as should be drawn on the credit of specific shipments in progress but not completed, of which defendants should be particularly advised before the drafts were presented for payment. *Ger. Nat. Bk. v. Tanka.* 442
20. Prior to the passage of the Penal Code, which makes it a misdemeanor to sell, or offer for sale, any package of goods falsely marked as to place where manufactured, quality or grade (§ 438), a contract for the sale of goods to be furnished with deceptive labels, intended by the parties and calculated to deceive customers of the purchaser, was against public policy, and the courts will not aid either party to enforce such a contract. *Materne v. Horwitz.* 469
21. Where, therefore, plaintiffs contracted to sell and deliver to defendants domestic sardines with labels upon the boxes representing

that they were put up at foreign ports by firms there engaged in the sardine trade, it being known to both parties that the labels were used to deceive the consumers,—*Held*, that plaintiffs were not entitled to maintain an action to recover the contract-price for the sardines, which plaintiffs tendered, but defendants refused to accept and pay for. *Id.*

22. Defendants contracted to sell and deliver to plaintiffs one hundred and seventy-five cases Connecticut tobacco, guaranteed "to be like samples." On receipt of bill plaintiffs paid for the purchase, by giving their promissory note for the amount. The tobacco delivered proved to be Massachusetts tobacco, which was of less value than the Connecticut; some of the cases were also inferior to the samples. Defendants were notified of the defects, and requested to return the note and take back the tobacco, but refused so to do; it was then, upon notice to defendants, sold at auction, in one lump. In an action to recover damages for breach of the contract, *held*, that plaintiffs' sale of the tobacco in a lump did not defeat their right to recover; that the measure of damages was the difference in value of the tobacco as warranted, and that actually delivered; and, to ascertain the latter, in the absence of other testimony, the amount received at the auction sale was properly resorted to. Also *held*, the fact that a note was given for the purchase-price, which it did not appear had been paid, did not defeat a recovery; that, under the circumstances, plaintiffs' liability on the note must be deemed the equivalent for cash. *Bach v. Levy.* 511

23. A payment, to take an oral contract for the sale of goods, for the price of \$50 or more, out of the statute of frauds, must be made at the time of the contract. (2 R. S. 136, § 3.) A payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior agreement valid; there must

be additional proof sufficient to show that at the time of the payment, the terms of the prior oral contract were in the minds of the parties and were reaffirmed by them. In which case a cause of action arises not on the prior oral contract, but on the new agreement. *Jackson v. Tupper.* 515

24. Such a prior void contract, however, may be validated by a subsequent receipt and acceptance, pursuant thereto; by the buyer, of the goods or a portion of them. *Id.*

—As to measure of damages for breach of contract to do work.

See B. P. & H. D. Establishment v. Wharton. (Mem.) 631

—Sufficiency of written note or memorandum to take contract for sale of goods for the price of \$50 or over out of statute of frauds.

See Doughty v. M. B. Co. (Mem.) 644

CORPORATIONS.

The act of 1883 (Chap. 378, Laws of 1883), in relation to receivers of corporations, including the second section thereof, in reference to receiver's fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in said section. *U. S. Trust Co. v. N. Y., W. S. & B. R. Co.* 478

See BENEVOLENT, ETC., ASSOCIATIONS.

INSURANCE (FIRE).

INSURANCE (LIFE).

INSURANCE (MARINE).

MANUFACTURING CORPORATIONS.

MUNICIPAL CORPORATIONS.

RAILROAD CORPORATIONS.

COSTS.

1. The court has no authority to impose as a condition of granting an order to set aside an execution against the person, unlawfully issued, that defendant shall stipulate not to sue for damages for an arrest under the unlawful pro-

cess; nor does the fact that the order awards costs, authorize the condition. *Chapin v. Foster.* 1

2. *It seems* that if the condition be attached to the award of costs only, it would be proper. *Id.*

3. The provision of the act of 1880 (§ 6, chap. 269, Laws of 1880) providing for the review and correction of assessments, which declares that costs shall not be awarded against assessors whose proceedings may be reviewed under the act, only relieves the assessors from costs upon the hearing at Special Term. Costs of appeal are to be given or withheld in the discretion of the court. (Code of Civ. Pro., § 3239.) *People, ex rel. Smith, v. Com'rs of Taxes, etc.* 651

COUNTY TREASURER.

A failure upon the part of a county treasurer to collect a bond and mortgage in his hands as such is not alone sufficient to create a liability against him. Facts must be shown establishing a neglect of duty on his part. *Woolley v. Baldwin.* 688

COURT

See COURT OF APPEALS.
GENERAL TERM.
SUPREME COURT.
SURROGATE'S COURT.

COURT OF APPEALS.

The provision of the Code of Criminal Procedure (§ 527), as amended by chapter 360, Laws of 1882, authorizing the appellate court to order a new trial in a criminal action, although no exceptions were taken on trial, applies only to the Supreme Court; this court has no authority to review the judgment unless exceptions have been duly and properly taken. *People v. Donovan.* 632

See APPEAL.

COVENANT.

— *When grantees not bound by assumption clause in deed.*
See Kelly v. Geer. (Mem) 664

CREDITOR'S SUIT.

1. Plaintiffs commenced an action against defendant McC., by service of summons by publication. An attachment was issued therein, which was levied upon certain lands, and plaintiffs obtained judgment. In an action brought to set aside as fraudulent against creditors, a conveyance of land by McC. to defendant McG., and to have the judgment declared a lien thereon, the latter attacked the attachment proceedings and the judgment. McG. was found guilty of co-operating with McC. to defraud his creditors. *Held*, that the proceedings should be upheld unless absolutely void for jurisdictional defects; and that they should be liberally construed to uphold the judgment, although they might have been held insufficient in a direct proceeding by the judgment debtor to set them aside. *Denman v. McGuire.* 161

2. While judgment creditors, holding distinct and several judgments, may unite in an action to set aside a conveyance of land by the common debtor, made in fraud of their rights as creditors, they are not all necessary parties to such an action, and where one of them has commenced such an action, the Code of Civil Procedure (§ 452) does not require the court to compel the plaintiffs to bring in the other judgment creditors. *White's Bk. of Buffalo v. Farthing.* 344

3. An order, therefore, denying a motion of other judgment creditors to be allowed to intervene in such an action is discretionary and is not reviewable here. *Id.*

4. *It seems* that the judgments are liens upon the land in the order of their docketing, and if the plaintiff in the action to set aside

the conveyance succeeds in establishing the fraud, he is entitled to a judgment setting aside the conveyance simply, or the court may compel the fraudulent grantees to convey the lands to a receiver, to be sold to satisfy plaintiff's judgment. If it simply sets aside the conveyance, the land will remain charged with the liens of the several judgments in their order; if it appoints a receiver and directs a conveyance to him, and the plaintiff in the action is a junior judgment creditor, a purchaser under the receiver's sale will take as of the time of the debtor's conveyance to the receiver, subject, however, to the liens of the prior judgments. *Id.*

5. The result, therefore, in either case will not affect the liens of said judgments. *Id.*

6. In such an action plaintiff also sought to charge certain other lands with the lien of its judgment, on the ground that the defendant was entitled to it as devisee of G., who had caused it to be conveyed to K. as security for a debt which had since been paid. *Held*, that this did not entitle the senior judgment creditors to intervene, as a judgment in accordance with the relief demanded would not prejudice any right which they might have to enforce their judgments against the lands. *Id.*

— *When assets of an insolvent firm may not be reached and applied to payment of individual debt of one of the co-partners.*

See F. E. Co. v. Lewis. (Mem.) 674

CRIMINAL TRIAL.

The provision of the Code of Civil Procedure (§ 834) prohibiting physicians and surgeons from disclosing information acquired in attending a patient is applicable to criminal trials. (Code of Criminal Procedure, § 392.) *People v. Murphy.* 126

— *When challenges for cause, on criminal trial, properly overruled.*
See People v. Otto. (Mem.) 690

DAMAGES.

1. Plaintiff owned a lot in the city of B., bounded easterly by the water-line of the East river, and southerly by the central line of J. street, which street terminated at said water-line. A wharf had been built in front of his lot, extending to the center of said street, which plaintiff maintained, receiving wharfage from all persons using the same. The city authorities built a pier at the end of the street, shutting off from the water that portion of plaintiff's wharf in front of his half of the street. In an action to recover damages, *held*, that the erection of the pier was a wrongful interference with plaintiff's rights, and rendered the city liable; that the pier was to be considered as an accretion, and so much of it as was in front of his half of the street became his; also, that plaintiff was entitled to recover, as damages, the wharfage received by the city from that portion of the pier in front of his land; that defendant, having wrongfully collected the wharfage, was not entitled to any allowance for expenses incurred in collecting the same, or for the cost of building the wrongful structure, or keeping it in repair. *Steers v. City of Brooklyn.* 51

2. Where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action, and it seems, for any damages thereafter sustained other actions may be brought successively until the nuisance shall be abated. The structure being a nuisance the railroad company is under legal obligation to remove it, and it is not to be presumed that it will continue it permanently. Damages, therefore, may not be awarded upon that assumption, nor will the judgment operate as a purchase of the right to have the structure remain. *Uline v. N. Y. C. & H. R. R. R. Co.* 98

3. Accordingly *held*, that proof and an allowance as damages for the

§§ 870, 876. <i>M. N. Bank v. Sheehan.</i>	176
§§ 968, 972. <i>Hammond v. Morgan.</i>	179
§§ 1035 et seq. <i>People v. Kiernan.</i>	618
(<i>Mem.</i>)	
§ 1180. <i>Hildreth v. City of Troy.</i>	234
1225. <i>Hammond v. Morgan.</i>	179
1309. <i>Evans v. Backer.</i>	289
§§ 1730, 1731. <i>Hammond v. Morgan.</i>	179
§ 1778. <i>Moran v. Long Island City.</i>	439
§§ 1948, 1953, 1984. <i>People, ex rel., v. Nolan.</i>	439
§ 2747. <i>People, ex rel., v. Chapin.</i>	682
§ 3239. <i>People, ex rel., v. Com'rs.</i>	651
§ 3320. <i>U. S. T. Co. v. N. Y., W. S. & B. R. Co..</i>	478

CODE OF CRIMINAL PROCEDURE.

§§ 376, 380. <i>People v. Otto. (Mem.)</i>	690
§ 392. <i>People v. Murphy</i>	126
§ 527. <i>People v. Donovan.</i>	632

CODE OF REMEDIAL JUSTICE.

- Proceedings taken during the twenty days that the Code of Remedial Justice was in force were valid if taken under that Code, or under the Code of Procedure, so far as any action was based upon them prior to September 1, 1877, when the Code of Civil Procedure went into effect. *Denman v. McGuire.* 161

COMMISSIONS.

1. The will of W., after directing the payment of debts and expenses, named six persons as "executors of and trustees under" it. A series of separate trust estates were constituted, running for the lives of the specified beneficiaries. Some of these required specific sums to be set apart, others provided for the severance of the trust estates from the general assets, and their management by five of the six persons so named, holding as trustees. A large portion of the trust estate consisted of real estate, and provision was made for partition.

Authority was conferred upon the trustees to lease and to sell certain portions, and general authority for the management of the land. The trustees were also empowered, in their discretion, to commit, by revocable power of attorney, the management of certain of the trust estates to the beneficiary. The accounts of the executors as such were settled, leaving in their hands only the trust estates, which were severed from the general assets, and thereafter separate accounts were kept with each beneficiary. Held, that by the will the testator contemplated and provided for two separate duties to be performed by his representatives, first as executors, and thereafter as trustees, and that they were entitled to commissions in both capacities, but that they were not entitled to commissions on the value of the real estate unsold at the termination of the trusts. *Phœnix v. Livingston.* 451

2. The act of 1883 (Chap. 878, Laws of 1883), in relation to receivers of corporations, including the second section thereof, in reference to receiver's fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in said section. *U. S. Trust Co. v. N. Y., W. S. & B. R. Co.* 478
3. The allowance of commissions to such a receiver is governed by the provision of the Code of Civil Procedure (§ 3320), providing for the allowance by the court or the judge where not "otherwise specially prescribed by statute." *Id.*

COMMON CARRIER.

1. Where a passenger on a railroad, by an illegal refusal to pay fare, renders it the duty of the conductor in enforcing the reasonable rules and regulations of the company to eject him from the cars, and the refusal and resistance of the passenger continues until after force has been required and ap-

plied to remove him, he cannot, by offering to pay fare, make the continuance of the process of expulsion unlawful, and, although he is ejected, after an offer to pay fare, at a place where the train ordinarily stops and receives passengers, this does not render the railroad company liable. *Pease v. D., L. & W. R. R. Co.* 367

2. A carrier of passengers is not required unconditionally to accept all persons who offer themselves for transportation and tender fare; he may lawfully decline to receive or carry those who refuse to conform to his reasonable rules, after knowledge of the same, or may after such refusal lawfully eject those who have been received. *Id.*

3. A consignee, who is owner of the consigned cargo, is liable to the owner or master of the vessel for damages in the nature of demurrage, for unreasonable delay in discharging the cargo after arrival, although the bill of lading contains no stipulation as to demurrage, and prescribes no time within which the cargo shall be discharged. *Scholl v. A. & R. I. & S. Co.* 602

4. By a bill of lading of a cargo of coal, the carrier was to discharge the cargo at the port of destination. On arrival he reported to the defendant, the consignee and owner of the coal, and requested to be discharged, offering to do the shoveling of the coal if defendant would provide for taking it away; this it declined to do, insisting that plaintiff should take his turn at the wharf, and he was detained some seven days over the customary time for discharging such cargo. In an action to recover demurrage, *held*, that there was in effect an offer to perform on the part of plaintiff, and that it was a question of fact to be determined upon all the circumstances whether there was unreasonable delay on the part of defendant in discharging. *Id.*

See RAILROAD CORPORATIONS.

COMPROMISE

1. In an action by a tax payer of the town of A., to have certain bonds issued by said town adjudged illegal and void, it appeared that the town, acting in supposed accordance with statutory provisions (Chap. 907, Laws of 1869, as amended by chap. 925, Laws of 1871) issued its bonds to pay for stock of a railroad corporation, which passed into the hands of innocent holders. The bonds were claimed by the town to have been illegally issued, and so invalid. While suits were pending to enforce them, said town, under the act of 1880 (Chap. 146, Laws of 1880), authorizing it "to issue new bonds pursuant to the provisions of chapter 75, Laws of 1878," and its amendments, to the amount and extent of its bonded indebtedness, issued the bonds in question in exchange for, and to retire the outstanding bonds, the new bonds drawing a lower rate of interest than the old ones. Said town at the time had no other "bonded indebtedness" than the original bonds issued as above stated. *Held*, that the action was not maintainable; that the town having elected to compromise rather than to contest the validity of the old bonds, was estopped from thereafter questioning it. *Huls v. Peekskill Sags. Bk.* 490

2. The defect alleged in the proceedings under which the original bonds were issued was that to the averment in the petition, that "the signers were a majority of the tax payers of the town, was not added the words 'not including those taxed for dogs or highway tax only.'" *Held*, that the defect did not render the bonds so absolutely void as matter of law, but that there might be reasonable question pending an adjudication; enough of doubt to justify the legislature in authorizing, and the town in effecting an amicable settlement. *Id.*

COMPTROLLER.

Where a person entitled to a leg-

acy or distributive share of a decedent's estate is unknown, and the money has been paid into the State treasury pursuant to the directions of the Code of Civil Procedure (§ 2747), it is not money of the State, or belonging to any of its funds, or funds under its management, within the meaning of the provision of the State Constitution (Art. 7, § 8), which prohibits the paying out of such moneys "except in pursuance of an appropriation by law," and upon compliance with the requirements of the Code and production of a certified copy of order directing payment of the legacy or distributive share to a claimant, it is the duty of the comptroller to draw his warrant therefor without such an appropriation. *People, ex rel. Evans, v. Chapin.* 683

CONDITIONS.

Where to a promise to accept a bill of exchange is attached a condition precedent, which is a substantive part of the promise, and is so coupled with it as to show that the promisor did not intend to bind himself except on compliance with the condition, this is not an unconditional promise to accept within the statute (1 R. S. 768, §§ 6, 8) such as will support an action against the promisor as acceptor. *Ger. Nat. Bk. v. Taaks.* 443

— *In action in nature of quo warranto, it is no defense that relator has not taken oath of office or demanded possession. These are not conditions precedent to right to recover.*

See People, ex rel., v. Nolan 540

CONFLICT OF LAWS.

In July, 1944, defendant, who was then residing in Toronto, Canada, married K., in this State and lived with him here as his wife until January, 1860, when she left him and returned to Toronto, where she continued to reside until 1865. K. removed to, and became a resident of Ohio, and in 1864, after a residence there of more than a year,

he commenced an action in that State for divorce on the ground that defendant had been willfully absent from him for more than three years. A copy of the petition and summons were mailed to defendant at Toronto, and were received by her. Notice of the filing of the petition, the purpose thereof, the time for hearing, and that depositions would be taken at Toronto at a time and place named, was duly published. Depositions were taken in pursuance of said notice, defendant being present but taking no part personally or by counsel. No other service was made upon defendant; the service made was, under the laws of Ohio, a legal service. A divorce was granted in 1864. By the terms of the decree, each party was "restored to the rights and privileges of unmarried persons." Defendant afterward married the plaintiff, and they lived together as husband and wife until 1890. Plaintiff, prior to his marriage, knew of defendant's former marriage and of the divorce proceedings, but not of the particular circumstances under which the decree of divorce was obtained. At the time of such marriage K. was and is still living in Ohio. In an action to have the marriage between the parties annulled, on the ground that defendant, at the time of such marriage, had a husband living, and that her former marriage was still in full force, *held* (MILLER, DANFORTH and FINCH, JJ., dissenting), that the Ohio court acquired no jurisdiction over the defendant and the decree of divorce was, as to her, inoperative and void; that, therefore, the marriage between her and plaintiff was illegal and void. *O'Dea v. O'Dea.* 23

CONSIGNOR AND CONSIGNEE.

A consignee, who is owner of the consigned cargo, is liable to the owner or master of the vessel for damages in the nature of demurrage, for unreasonable delay in discharging the cargo after arrival, although the bill of lading contains no stipulation as to demur-

rage, and prescribes no time within which the cargo shall be discharged. *Scholl v. A. & R. I. & S. Co.* 602

CONSTITUTION.

1. A municipal corporation has no right, in the exercise of its power, to determine when, where and how to make improvements, to do so upon a plan which substantially involves the appropriation by it of the property of a citizen to a public use without making compensation therefor. *Seifert v. City of B'klyn.* 186

2. *It seems* that immunity from liability for the consequences following the exercise of judicial or discretionary power by a municipal corporation presupposes that the act performed may in some manner be lawfully authorized. Where the act is of such nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is insufficient as a protection. *Id.*

3. Where a person entitled to a legacy or distributive share of a decedent's estate is unknown, and the money has been paid into the State treasury pursuant to the directions of the Code of Civil Procedure (§ 2747), it is not money of the State, or belonging to any of its funds, or funds under its management within the meaning of the provision of the State Constitution (Art. 7, § 8), which prohibits the paying out of such moneys "except in pursuance of an appropriation by law" and upon compliance with the requirements of the Code and production of a certified copy of order directing payment of the legacy or distributive share to a claimant, it is the duty of the comptroller to draw his warrant therefor without such an appropriation. *People, ex rel. Evans, v. Chapin.* 682

CONSTITUTIONAL LAW.

1. The act of 1885 (Chap. 17, Laws

of 1885), entitled "An act for the relief of the village of Clinton," is not violative of the constitutional provision (State Const., art. 3, § 16), declaring that no private or local bill "shall embrace more than one subject and that shall be expressed in the title"; and said act was within the authority of the legislature and is valid. *Bd. Water Comrs. v. Dwight.* 9

2. Said act, although a local, is not a private one. *Id.*

3. The act of 1866 (Chap. 367, Laws of 1866), entitled "An act relative to the powers and duties of the commissioners of Central Park," is not violative of the constitutional requirement (State Const., art. 3, § 16), that a local or private bill shall embrace but one subject, which shall be expressed in the title. *In re Knaut.* 188

4. The provisions of the Code of Civil Procedure (§ 1778), providing that in an action against a foreign or domestic corporation upon "a promissory note or other evidence of debt, for the absolute payment of money," the plaintiff may take judgment as in case of default, unless defendant serves with its answer or demurrer a copy of an order directing the issue to be tried, etc., is constitutional. *Moran v. L. I. City.* 439

— Chapter 75, Laws of 1878, constitutional.

See *Hills v. P. S. Bank.* 490

— Chapter 277, Laws of 1878, amending charter of village of Port Chester, violative of constitutional provision (Art. 3, § 16), requiring that a local bill shall embrace but one subject, which shall be expressed in title.

See *Tingue v. Village of Port Chester.* 294

— — When consideration of question as to constitutionality of law authorizing a local improvement properly refused on motion to vacate appointment of commissioners and party left to his remedy by action.

See *In re opening, etc., of Flushing Ave (Mem.)* 678

CONSTRUCTION.

The description clause in a deed is to be so construed if possible as to carry out the intent of the parties; for this purpose false particulars in the description are to be rejected and less material points subordinated to the more certain and material ones when there is inconsistency between them; thus monuments generally control courses and distances. *Masten v. Olcott.* 152

CONTEMPT.

1. An act which is not a civil or private contempt, and is not enumerated among criminal contempts (Code of Civ. Pro., § 8), is not a contempt, although it may be punishable as a misdemeanor. *People, ex rel. Munsell, v. Ct. Oyer & Terminer.* 245

2. During the progress of the trial of an indictment for assault with intent to kill, one of the jurors went to the scene of the affray for the purpose of acquainting himself with the locality. For this act he was adjudged by the court guilty of contempt, and was committed therefor. *Held error.* *Id.*

3. The distinction between private or civil and public or criminal contempts pointed out. *Id.*

— *It seems a judgment in replevin where no damages have been assessed on value of property found can only be enforced by execution, not by punishment for contempt.*

Hammond v. Morgan.

179

CONTRACT.

1. A contract for the sale of goods may not be predicated on an offer which was modified or withdrawn before an unconditional acceptance. *Schenectady Stove Co. v. Holbrook.* 45

2. Under an offer of immediate sale, the buyer cannot extend the times

of payment, by postponing the time of delivery, without the vendor's consent. *Id.*

3. On August 16, 1879, plaintiff, in answer to a request from defendant's firm, gave by letter its prices for certain goods, with this statement, "this price only to hold good till thirtieth September." On September twenty-second defendants sent an order with directions, to have the goods ordered, put up and marked in a specified way, and sent in five or six shipments, at intervals of ten days or two weeks. In September, prior to the giving of the order, C., an agent of the plaintiff, had made to defendant a proposition, modifying slightly the written offer; plaintiff, on September twenty-fifth, wrote defendants, acknowledging receipt of order, giving their understanding of the terms proposed by C.; on September twenty-ninth, defendants sent another order, claiming, however, that the prices given by C. were less than as stated by plaintiff; plaintiff returned the order, with letter, stating it was beyond its power to accept. In an action to recover for the goods delivered under the first order, defendants set up as a counter-claim, damages for failure to fill the second order. *Held untenable; that no contract was made for the sale of the goods specified in such order.* *Id.*

4. The parties entered into a contract by which defendant agreed that, if plaintiffs should succeed in selling fifty of the defendant's sewing machines to one firm or party in Mexico, during a trip of their agent about to be made, for every fifty machines so sold they should have the sole agency for the sale of said machines in that locality, and defendant agreed to furnish the machines. Plaintiffs' agent made two sales of fifty machines to persons in different localities in Mexico, under an agreement that the purchaser should be the sole agent for the sale of the machines in that locality; one of the orders defendant filled, the other it refused, and refused to fill further orders

- from plaintiffs or their agents, and repudiated the contract. In an action to recover damages for breach of the contract, *held*, that plaintiffs were not confined to the damages sustained by reason of the refusal of the defendant to fill the orders actually given, but were entitled to recover such damages as they could show they had sustained by a total breach of the contract, *i. e.*, the value of the contract; not merely imaginary or speculative damages, but such as were reasonably certain, and such only as actually followed or might follow from such breach, such as a jury could determine approximately upon reasonable conjecture and probable estimates. *Wakeman v. W. & W. Mfg. Co.* 203
5. A person violating a contract should not be permitted entirely to escape liability because the amount of the damage he has caused is uncertain. *Id.*
6. Prospective profits, so far as they can properly be proved, and which would certainly have been realized but for defendant's default, are allowable as damages, although the amount is uncertain. *Id.*
7. The rule that damages which are contingent and uncertain cannot be recovered embraces only such as are not the certain result of the breach, not such as are the certain result but uncertain in amount. *Id.*
8. It is essential to the legal statement in a complaint of a cause of action *ex contractu*, that it should allege an existing contract and the performance by plaintiff of such conditions precedent as are thereby provided, or a tender of performance or some adequate excuse for non-performance. *Bogardus v. N. Y. L. Ins. Co.* 323
9. Such an excuse exists only when the defendant has prevented performance by plaintiff, or has himself wholly refused to perform, or has wholly disabled himself from completing a substantial performance. *Id.*
10. The failure of the defendant to perform some of the obligations of the contract which go to a part only of the consideration, when the breach may be paid for in damages, is not sufficient. *Id.*
11. A mere representation made during the pendency of negotiations for a contract is not actionable, even if untrue; it must appear to have been material and made under such circumstances as to show that it was intended as a warranty of the fact represented, and so constituting a contract. A mere allegation in a complaint, therefore, of a representation is not equivalent to an averment of warranty or contract. *Id.*
12. Plaintiff purchased of defendant certain personal property covered by a chattel mortgage; the latter gave a bill of sale by which he covenanted "to warrant and defend the sale," and a writing by which he certified that the chattel mortgage would thereafter be paid by him; not having been paid it was foreclosed and the property was purchased by N. for \$700, the amount due on the mortgage. N. claimed the property, and plaintiff paid him \$1,000 therefor. In an action to recover damages for the breach of defendant's agreements plaintiff recovered the amount due on the mortgage. *Held* no error; that no actual eviction was necessary to sustain the action; that as he could not withhold the property from the purchaser without becoming a wrong-doer, his submission, although peaceable, was not voluntary. *Cahill v. Smith.* 355
13. Defendant contracted to sell plaintiff ten car-loads of iron—" (C) Blooms"—to be delivered "as fast as they may be produced, small enough to meet the usual requirements of measure." Five car-loads were delivered. In an action to recover damages for non-delivery of the residue, *held*, the contract required, not simply that the blooms should be delivered as fast as they were actually produced, but that they should be produced in the ordinary opera-

- tions of defendant's forge, with reasonable diligence and by reasonable and proper efforts, and defendant was not authorized to stop the production from motives of economy or convenience. *Stewart v. Marvel.* 357
14. Evidence was offered on the part of plaintiffs and received under objection, that defendant stated, at the time the contract was made, that he could produce a car load of blooms for delivery every ten days. *Held* no error. *Id.*
15. The parties entered into a contract by which plaintiff agreed to alter certain boilers belonging to defendants, in a manner specified, the stipulated price for the work defendants agreed to pay as soon as they "are satisfied that the boilers as changed are a success." The work was completed within the time agreed upon, and defendants then began and thereafter continued the use of the boilers without objection or complaint. In an action to recover the contract-price defendants claimed that the question as to whether the work was a success was one for them alone to determine. *Held* untenable; and that a simple allegation of dissatisfaction, without a good reason therefor, was no defense. *Duplex S. B. Co. v. Garder.* 887
16. Under such a contract, that which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with. *Id.*
17. Prior to the passage of the Enabling Act of 1884 (Chap. 381, Laws of 1884) a married woman, who had no separate estate and was not engaged in any separate business, was incapable, by reason of her coverture, of making a contract. *Linderman v. Farquharson.* 434
18. Even where she had a separate estate, a promissory note made by her was open to the defense of want of consideration, although in the hands of a *bona fide* holder for value. *Id.*
19. Defendants' firm, doing business in the city of New York, wrote a letter to B. & Co., a firm doing business in New Orleans, which contained this clause "We are ready to pay your sight drafts on us which you advise us as having been drawn against particularly described shipments to the extent of \$50,000 on account of subsequent remittances." Plaintiff, in reliance upon this letter, purchased of B. & Co. two sight drafts, drawn by that firm upon defendants. They were not accompanied by bills of lading or any advices of shipments, and no such advices were sent to defendants. Defendants refused to pay the drafts. In an action thereon, *held*, that it could not be sustained either as an action upon an acceptance, because the promise was conditional, nor as an action upon the letter, treating it as a general letter of credit, because the condition upon which the liability depended was not performed; that while the letter did not contemplate that drafts were to be accompanied by bills of lading, or were only to be drawn after shipment had been fully completed, the promise was limited to the acceptance of such uncovered drafts as should be drawn on the credit of specific shipments in progress but not completed, of which defendants should be particularly advised before the drafts were presented for payment. *Ger. Nat. Bk. v. Tanks.* 442
20. Prior to the passage of the Penal Code, which makes it a misdemeanor to sell, or offer for sale, any package of goods falsely marked as to place where manufactured, quality or grade (§ 438), a contract for the sale of goods to be furnished with deceptive labels, intended by the parties and calculated to deceive customers of the purchaser, was against public policy, and the courts will not aid either party to enforce such a contract. *Materne v. Horvitz.* 460
21. Where, therefore, plaintiffs contracted to sell and deliver to defendants domestic sardines with labels upon the boxes representing

that they were put up at foreign ports by firms there engaged in the sardine trade, it being known to both parties that the labels were used to deceive the consumers.—*Held*, that plaintiffs were not entitled to maintain an action to recover the contract-price for the sardines, which plaintiffs tendered, but defendants refused to accept and pay for. *Id.*

22. Defendants contracted to sell and deliver to plaintiffs one hundred and seventy-five cases Connecticut tobacco, guaranteed "to be like samples." On receipt of bill plaintiffs paid for the purchase, by giving their promissory note for the amount. The tobacco delivered proved to be Massachusetts tobacco, which was of less value than the Connecticut; some of the cases were also inferior to the samples. Defendants were notified of the defects, and requested to return the note and take back the tobacco, but refused so to do; it was then, upon notice to defendants, sold at auction, in one lump. In an action to recover damages for breach of the contract, *held*, that plaintiffs' sale of the tobacco in a lump did not defeat their right to recover; that the measure of damages was the difference in value of the tobacco as warranted, and that actually delivered; and, to ascertain the latter, in the absence of other testimony, the amount received at the auction sale was properly resorted to. Also *held*, the fact that a note was given for the purchase-price, which it did not appear had been paid, did not defeat a recovery; that, under the circumstances, plaintiffs' liability on the note must be deemed the equivalent for cash. *Bach v. Levy.* 511

23. A payment, to take an oral contract for the sale of goods, for the price of \$50 or more, out of the statute of frauds, must be made at the time of the contract. (2 R. S. 126, § 3.) A payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior agreement valid; there must

be additional proof sufficient to show that at the time of the payment, the terms of the prior oral contract were in the minds of the parties and were reaffirmed by them. In which case a cause of action arises not on the prior oral contract, but on the new agreement. *Jackson v. Tupper.* 515

24. Such a prior void contract, however, may be validated by a subsequent receipt and acceptance, pursuant thereto; by the buyer, of the goods or a portion of them. *Id.*

—As to measure of damages for breach of contract to do work.
See B. P. & H. D. Establishment v. Wharton. (Mem.) 631

—Sufficiency of written note or memorandum to take contract for sale of goods for the price of \$50 or over out of statute of frauds.
See Doughty v. M. B. Co. (Mem.) 644

CORPORATIONS.

The act of 1883 (Chap. 378, Laws of 1883), in relation to receivers of corporations, including the second section thereof, in reference to receiver's fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in said section. *U. S. Trust Co. v. N. Y., W. S. & B. R. Co.* 478

See BENEVOLENT, ETC., ASSOCIATIONS.
INSURANCE (FIRE).
INSURANCE (LIFE).
INSURANCE (MARINE).
MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.

COSTS.

1. The court has no authority to impose as a condition of granting an order to set aside an execution against the person, unlawfully issued, that defendant shall stipulate not to sue for damages for an arrest under the unlawful pro-

cess; nor does the fact that the order awards costs, authorize the condition. *Chapin v. Foster.* 1

2. *It seems* that if the condition be attached to the award of costs only, it would be proper. *Id.*

3. The provision of the act of 1880 (§ 6, chap. 269, Laws of 1880) providing for the review and correction of assessments, which declares that costs shall not be awarded against assessors whose proceedings may be reviewed under the act, only relieves the assessors from costs upon the hearing at Special Term. Costs of appeal are to be given or withheld in the discretion of the court. (Code of Civ. Pro., § 3239.) *People, ex rel. Smith, v. Com'rs of Taxes, etc.* 651

COUNTY TREASURER.

A failure upon the part of a county treasurer to collect a bond and mortgage in his hands as such is not alone sufficient to create a liability against him. Facts must be shown establishing a neglect of duty on his part. *Woolley v. Baldwin.* 688

COURT

See COURT OF APPEALS.
GENERAL TERM.
SUPREME COURT.
SUCROGATE'S COURT.

COURT OF APPEALS.

The provision of the Code of Criminal Procedure (§ 527), as amended by chapter 380, Laws of 1882, authorizing the appellate court to order a new trial in a criminal action, although no exceptions were taken on trial, applies only to the Supreme Court; this court has no authority to review the judgment unless exceptions have been duly and properly taken. *People v. Donovan.* 632

See APPEAL.

COVENANT.

— *When grantee not bound by assumption clause in deed.*
See Kelly v. Geer. (Mem.) 664

CREDITOR'S SUIT.

1. Plaintiffs commenced an action against defendant McC., by service of summons by publication. An attachment was issued therein, which was levied upon certain lands, and plaintiffs obtained judgment. In an action brought to set aside as fraudulent against creditors, a conveyance of land by McC. to defendant McG., and to have the judgment declared a lien thereon, the latter attacked the attachment proceedings and the judgment. McG. was found guilty of co-operating with McC. to defraud his creditors. *Held*, that the proceedings should be upheld unless absolutely void for jurisdictional defects; and that they should be liberally construed to uphold the judgment, although they might have been held insufficient in a direct proceeding by the judgment debtor to set them aside. *Denman v. McGuire.* 161

2. While judgment creditors, holding distinct and several judgments, may unite in an action to set aside a conveyance of land by the common debtor, made in fraud of their rights as creditors, they are not all necessary parties to such an action, and where one of them has commenced such an action, the Code of Civil Procedure (§ 452) does not require the court to compel the plaintiffs to bring in the other judgment creditors. *White's Bk. of Buffalo v. Farthing.* 344

3. An order, therefore, denying a motion of other judgment creditors to be allowed to intervene in such an action is discretionary and is not reviewable here. *Id.*

4. *It seems* that the judgments are liens upon the land in the order of their docketing, and if the plaintiff in the action to set aside

the conveyance succeeds in establishing the fraud, he is entitled to a judgment setting aside the conveyance simply, or the court may compel the fraudulent grantee to convey the lands to a receiver, to be sold to satisfy plaintiff's judgment. If it simply sets aside the conveyance, the land will remain charged with the liens of the several judgments in their order; if it appoints a receiver and directs a conveyance to him, and the plaintiff in the action is a junior judgment creditor, a purchaser under the receiver's sale will take as of the time of the debtor's conveyance to the receiver, subject, however, to the liens of the prior judgments. *Id.*

5. The result, therefore, in either case will not affect the liens of said judgments. *Id.*

6. In such an action plaintiff also sought to charge certain other lands with the lien of its judgment, on the ground that the defendant was entitled to it as devisee of G., who had caused it to be conveyed to K. as security for a debt which had since been paid. *Held*, that this did not entitle the senior judgment creditors to intervene, as a judgment in accordance with the relief demanded would not prejudice any right which they might have to enforce their judgments against the lands. *Id.*

— When assets of an insolvent firm may not be reached and applied to payment of individual debt of one of the co-partners.

See *F. E. Co. v. Lewis*. (Mem.) 674

CRIMINAL TRIAL.

The provision of the Code of Civil Procedure (§ 834) prohibiting physicians and surgeons from disclosing information acquired in attending a patient is applicable to criminal trials. (Code of Criminal Procedure, § 392.) *People v. Murphy*. 126

— When challenge for cause, on criminal trial, properly overruled.

See *People v. Otto*. (Mem.) 690

DAMAGES.

1. Plaintiff owned a lot in the city of B., bounded easterly by the water-line of the East river, and southerly by the central line of J. street, which street terminated at said water-line. A wharf had been built in front of his lot, extending to the center of said street, which plaintiff maintained, receiving wharfage from all persons using the same. The city authorities built a pier at the end of the street, shutting off from the water that portion of plaintiff's wharf in front of his half of the street. In an action to recover damages, *held*, that the erection of the pier was a wrongful interference with plaintiff's rights, and rendered the city liable; that the pier was to be considered as an accretion, and so much of it as was in front of his half of the street became his; also, that plaintiff was entitled to recover, as damages, the wharfage received by the city from that portion of the pier in front of his land; that defendant, having wrongfully collected the wharfage, was not entitled to any allowance for expenses incurred in collecting the same, or for the cost of building the wrongful structure, or keeping it in repair. *Steers v. City of Brooklyn*. 51

2. Where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action, and it seems, for any damages thereafter sustained other actions may be brought successively until the nuisance shall be abated. The structure being a nuisance the railroad company is under legal obligation to remove it, and it is not to be presumed that it will continue it permanently. Damages, therefore, may not be awarded upon that assumption, nor will the judgment operate as a purchase of the right to have the structure remain. *Uline v. N. Y. C. & H. R. R. Co.* 98

3. Accordingly *held*, that proof and an allowance as damages for the

permanent diminution in the market value of plaintiff's lots was improper, conceding that the embankment was unlawfully constructed. *Id.*

4. The authorities upon the subject of the damages recoverable in actions of trespass collated and discussed. *Id.*

5. The parties entered into a contract by which defendant agreed that, if plaintiffs should succeed in selling fifty of the defendant's sewing machines to one firm or party in Mexico, during a trip of their agent about to be made, for every fifty machines so sold they should have the sole agency for the sale of said machines in that locality, and defendant agreed to furnish the machines. Plaintiffs' agent made two sales of fifty machines to persons in different localities in Mexico under an agreement that the purchaser should be the sole agent for the sale of the machines in that locality; one of the orders defendant filled, the other it refused, and refused to fill further orders from plaintiffs or their agents, and repudiated the contract. In an action to recover damages for breach of the contract, *held*, that plaintiffs were not confined to the damages sustained by reason of the refusal of the defendant to fill the orders actually given, but were entitled to recover such damages as they could show they had sustained by a total breach of the contract; *i. e.*, the value of the contract, not merely imaginary or speculative damages, but such as were reasonably certain, and such only as actually followed or might follow from such breach, such as a jury could determine approximately upon reasonable conjecture and probable estimates. *Wakeman v. W. & W. Manfg. Co.* 205

6. A person violating a contract should not be permitted entirely to escape liability because the amount of the damage he has caused is uncertain. *Id.*

7. Prospective profits, so far as they can properly be proved, and which would certainly have been realized

but for defendant's default, are allowable as damages, although the amount is uncertain. *Id.*

5. The rule that damages which are contingent and uncertain cannot be recovered embraces only such as are not the certain result of the breach, not such as are the certain result, but uncertain in amount. *Id.*

9. The authorities on the subject of the allowance of prospective profits as damages collated and discussed. *Id.*

10. In an action to recover damages for breach of a contract to form and continue a partnership for a specified term, the opinion of the witnesses as to the value of the contract to plaintiff, or as to what would have been his share of the profits had the contract been carried out, is incompetent and its reception error. *Reed v. McConnell.* 270

11. Defendants contracted to sell and deliver to plaintiffs one hundred and seventy-five cases Connecticut tobacco, guaranteed "to be like samples." On receipt of bill plaintiffs paid for the purchase, by giving their promissory note for the amount. The tobacco delivered proved to be Massachusetts tobacco, which was of less value than the Connecticut; some of the cases were also inferior to the samples. Defendants were notified of the defects, and requested to return the note and take back the tobacco, but refused so to do; it was then, upon notice to defendants, sold at auction, in one lump. In an action to recover damages for breach of the contract, *held*, that plaintiffs' sale of the tobacco in a lump did not defeat their right to recover; that the measure of damages was the difference in value of the tobacco as warranted, and that actually delivered; and, to ascertain the latter, in the absence of other testimony, the amount received at the auction sale was properly resorted to. *Bach v. Levy.* 511

12. While the legislature may abolish an office, diminish the salary

or change the mode of compensation during the term of an incumbent, subject only to constitutional restrictions, yet within these limits the right to an office carries with it the right to emoluments, and an officer unlawfully dispossessed of his office may, upon his reinstatement therein, maintain an action against an intruder, to recover the damages resulting from the intrusion; as a general rule, the salary or fees of the office received by the intruder are the measure of damages. *Nichols v. MacLean.* 526

— In action in the nature of *quo warranto*, the damages are the salary or emoluments received by defendant while he unlawfully held the office.

See *People, ex rel., v. Nolan.* 539

— As to measure of damages for breach of contract to do work.

See *B. P. & H. D. Establishment v. Whurton.* (Mem.) 631

DEBTOR AND CREDITOR.

1. The fact that a mortgage was given or it seems that property was transferred, by a debtor for a valuable consideration, is not, as a proposition of law, inconsistent with the existence of an intent on the part of the debtor to defraud his creditors, or of such knowledge thereof, on the part of the mortgagee or purchaser, as will avoid the mortgage or conveyance, and in this regard no distinction can be made between the consideration furnished by an existing debt and that arising in any other manner. When there is an actual intent to defraud, no form in which the transaction is put can shield the property transferred from the claim of creditors. *Billings v. Russell.* 226
2. Proof, therefore, that a mortgage executed by an insolvent debtor was given to secure a debt actually owing by the mortgagor does not, as matter of law, disprove the existence of a fraudulent intent on the part of the debtor. *Id.*
3. One of two partners on retiring

from the business transferred to his copartner his interest in the firm property, each agreeing to pay one-half of its debts. The firm was solvent, but the remaining partner was in fact insolvent at the time. This, however, was not known to him or the retiring partner, and the transfer was made in good faith. In an action wherein creditors of the firm claimed a preference over the individual creditors of the remaining partner, *held*, that by the transfer the title vested in the remaining partner as his own private estate; that he acquired the same dominion over it as if it had always been his own separate property free from any lien or equity on the part of partnership creditors, and that transfers by him of the property in payment of individual debts were lawful. *Stanton v. Westover.* 265

4. The General Assignment Act of 1877 (Chap. 466, Laws of 1877) does not include or apply to a specific assignment by a debtor for the benefit of one or a portion of his creditors, and such an assignment is not void because not executed in compliance with the provisions of said act. *Royer Wheel Co. v. Fielding.* 504
5. The provision of the Revised Statutes (1 R. S. 678, § 53), providing for express trusts to sell lands for the benefit of creditors, does not prohibit the grantee of an insolvent debtor from executing a mortgage to secure the payment of specific debts of the grantor in pursuance of a prior oral understanding entered into at the time of the execution of the conveyance. *Id.*
6. A mortgage so executed is not rendered void by a provision therein requiring any surplus arising on foreclosure sale to be paid over to the mortgagor. *Id.*
7. A member of a firm may appropriate his individual property to the payment of the firm debts, and where the firm has made a general assignment for the benefit

of its creditors a conveyance by one of its members of his individual property to the assignee, to be disposed of and applied in accordance with the terms of the assignment to the payment of the partnership debts, is not *per se* fraudulent or unlawful and void.

Id.

8. After inquisition found and the appointment of a committee of the estate of a lunatic, the court has jurisdiction to direct the application of the estate to the payment of demands existing against it, and this relief may be granted on petition of a claimant. *In re Otis*. 580

9. Where the estate is insufficient to pay the debts, the assets, personal as well as real, must be distributed ratably among all the creditors; the petitioning creditor is not entitled to a preference. *Id.*

10. A claim for rent under a lease to the lunatic, whether accruing before or after the appointment of a committee, has no intrinsic preference over his other debts, and in the absence of some special equity growing out of the circumstances of the particular case, the landlord comes in simply as a general creditor for the rent unpaid. *Id.*

11. *It seems* that if the leased premises are occupied by the committee and such occupation is to the advantage of the estate as when it is necessary to carry on or close up the business of the lunatic, the rent accruing during such occupation will be regarded as a reasonable expense incurred by the committee to be paid before the claims of other creditors. *Id.*

12. Where, therefore, the committee of the estate of a lunatic continued to carry on his business, occupying for that purpose premises held by him under a lease for a term of years, and thereafter the committee resigned and a new one was appointed who closed up the business, and upon petition of the landlord that said committee be required to pay rent subsequently

accruing, it appeared that the committee had not occupied the premises during any portion of the quarter for which rent was claimed, also that the estate was insolvent, *held*, that the prayer of the petition was properly denied; that he was not entitled to a preference, but simply to come in and share with the other creditors. *Id.*

See CREDITOR'S SUIT.

DEED.

1. The description clause in a deed is to be so construed if possible as to carry out the intent of the parties; for this purpose false particulars in the description are to be rejected and less material points subordinated to the more certain and material ones when there is inconsistency between them; thus monuments generally control courses and distances. *Masten v. Olcott*. 152

2. When a deed has been duly acknowledged, although there appears to have been a subscribing witness, it is not necessary to call him for the purpose of proving its execution. *Simmons v. Havens*. 427

3. In an action of ejectment, plaintiff claimed title under a deed which she alleged had been executed and delivered to her by her mother, who afterward obtained possession thereof and destroyed it, and then deeded the land to defendant, who had full knowledge of the previous conveyance. Plaintiff proved by several witnesses that she had in her possession a deed purporting to convey the premises, to be executed under seal by her mother, and to be acknowledged before L., a justice of the peace; also that such a deed was delivered to her by her mother, and placed by her in her bureau drawer, from which it was subsequently taken by the mother and burned on account of her displeasure at her daughter's marriage. Plaintiff also proved admissions on the part of defend-

ant that the deed in question had been executed at his suggestion, as claimed by plaintiff; that it was acknowledged before L., and that defendant, with full knowledge thereof, subsequently purchased the property, believing the deed did not amount to any thing, as it was not recorded and had been destroyed. *Held*, the evidence was sufficient to justify a finding by the jury that the deed to plaintiff was duly executed, acknowledged and delivered. *Id.*

— *When the word "appurtenances" in a deed insufficient to pass a right of way, and when such an easement does and when it does not pass by deed.*

See Longdyke v Anderson. (Mem.) 625

— *Where grantee not bound by assumption clause in deed.*

See Kelly v Geer (Mem.) 684

DEFENSES.

— *Want of consideration a good defense to an action by bona fide holder on note executed by married woman, prior to passage of enabling act (Chap. 381, Laws of 1884.)*

See Linderman v Parquharson. 434

— *In action in nature of quo warranto, it is no defense that relator has taken oath of office or demanded possession. These are not conditions precedent to right to recover.*

See People, ex rel. Swinburne, v. Nolan. 539

DEFINITIONS

1 The provisions of the Code of Civil Procedure (§§ 1496, 1531), providing for recovery in an action of ejectment as damages for withholding the property, "the rents and profits, or the value of the use and occupation of the property," may be regarded as the legislative definition of the ancient technical term "mesne profits." *Wallace v Berdell.* 13

2. The "tunnels, tracks, substructures, superstructures, stations, viaducts and masonry" of the N. Y. & H. R. R. Co., situate on and under Fourth avenue in the city of New York, are "land" within the meaning of that word as used in the statute in reference to property liable to taxation (1 R. S. 837, § 2), and are assessable as such. *People, ex rel. N. Y. & H. R. R. Co., v. Com'rs of Taxes.* 322

3. As regards taxation it is immaterial whether a railroad is laid upon the surface, placed on pillars, or carried through a covered way or tunnel, the structures adopted to sustain it, or facilitate and protect its use, are, within the meaning of the law, land, and for them the railroad company is liable to be taxed. *Id.*

4. The "United States Lloyd's" issued an open policy of marine insurance, which became operative only by special indorsement, describing the particular risk assumed. As issued, the underwriters were liable for loss of "animals caused directly by stranding, sinking, burning or collision." This was subsequently modified by inserting after the words "directly by," the words "a sea." Thereafter this indorsement was made upon the policy. "February 16, 1878, steamer *Greece*, New York to London, 183 live cattle; amount insured, \$9,500." The shipment referred to was made February 14. Both parties knew at the time of the indorsement that the cattle were carried between decks. The steamer encountered a severe storm; the waves caused it "to roll tremendously;" the cattle were thrown down violently, and most of them were killed. In an action upon the policy, *held*, that the loss was caused "directly by a sea," within the meaning of the policy, and that the insurers were liable; that the risk contemplated was some effect of "a sea" upon the vessel, the proximate result of which would be a loss to the property insured, and this was not limited to an effect produced by one or more

specific and particular waves, as distinguished from the general commotion of the water *Snowden v. Guion*. 458

5. The words "bonded indebtedness," as used in the acts, chap. 75, Laws of 1878, and chap. 146, Laws of 1880, are not limited to bonds in all respects legal and valid, but the acts authorize the refunding of "all municipal bonds save such as" have been adjudged invalid by the final determination of a competent court, which are excluded from their operation by chapter 317, Laws of 1878. *Hills v. Peekskill Sogs. Bk.* 490

6. The "franchises, privileges, rights and liberties," which, under the act of 1878 (Chap. 163, Laws of 1878), a manufacturing corporation is authorized to mortgage, to secure the payment of a debt, upon consent of the requisite number of stockholders, and which are not included in a consent to mortgage the real and personal estate of the corporation, are the corporate rights and franchises which became vested in the company by virtue of its organization as a corporation. Those terms do not include patent rights, licenses, easements, or privileges acquired by the company after its incorporation, either from individuals or other corporations; these are in the nature of property, and are, therefore, included in a consent to mortgage the corporate property. *Lord v. Yonkers F. G. Co.* 614

DEMAND.

- No demand for a return of the money paid is necessary before the commencement of an action to recover back money involuntarily paid in satisfaction of an assessment valid on its face, but in fact void. *Breucher v. Village of Port Chester*. 240

DEMURRAGE.

1. A consignee, who is owner of the consigned cargo, is liable to the

owner or master of the vessel for damages in the nature of demurrage, for unreasonable delay in discharging the cargo after arrival, although the bill of lading contains no stipulation as to demurrage, and prescribes no time within which the cargo shall be discharged *Scholl v. A. & R. I. & N. Co.* 603

2. By a bill of lading of a cargo of coal, the carrier was to discharge the cargo at the port of destination. On arrival he reported to the defendant, the consignee and owner of the coal, and requested to be discharged, offering to do the shoveling of the coal if defendant would provide for taking it away; this it declined to do, insisting that plaintiff should take his turn at the wharf, and he was detained some seven days over the customary time for discharging such cargo. In an action to recover demurrage, *held*, that there was, in effect, an offer to perform on the part of plaintiff, and that it was a question of fact to be determined upon all the circumstances whether there was unreasonable delay on the part of defendant in discharging. *Id.*

DEPOSITION.

The Code of Civil Procedure (§§ 870, 876) authorizes the granting of an order, before an action has actually commenced in a court of record, for the examination of a person against whom such an action is "about to be brought," upon the application of the person who is about to bring the action. *Mer. Nat. Bk. v. Sheehan*. 176

DISCONTINUANCE.

1. Except where substantial rights of other parties have accrued and injustice will be done to them by permitting it, a party has a right to discontinue an action or proceeding, and his reasons for so doing are of no concern to the court. *In re Butler*. 307

2. A refusal of leave to discontinue, therefore, where nothing appears to show that it will injuriously affect the rights or interests of the adverse party, is not within the discretion of the court, and is error. *Id.*
3. Where an administrator of the estate of a deceased lunatic commenced proceedings by petition in the Court of Common Pleas of the city of New York, to compel the committee of the lunatic to account and to deliver over the property remaining, and thereafter entered an *ex parte* order of discontinuance, the costs to be paid by the administrator, which order, after tender of costs, was vacated by the court, and thereupon the administrator moved for leave to discontinue, which was denied, the only facts shown being that after the entry of the first order the administrator had commenced an action in the Supreme Court to settle the accounts. *Held*, that there was no just basis for the refusal of leave upon which any discretion was called into exercise or could operate; and that the denial of the motion was error. *Id.*

DISORDERLY PERSONS.

1. The section of the Penal Code (§ 291), authorizing and directing the arrest of children found begging, etc., and their commitment "to any charitable, reformatory or other institution authorized by law to receive and take charge of minors," does not repeal, or, as to commitments under said act to the New York Catholic Protectory, dispense with the provisions of the charter of said protectory (Chap. 448, Laws of 1863), or of the Consolidation Act (§ 1618 *et seq.*, chap. 410, Laws of 1882) requiring notice of the commitment to be given to the parents, guardian, etc., of a child so committed, and giving the parents or guardian an opportunity to be heard. *People, ex rel. Van Heck, v. N. Y. Cath. Protectory.* 195
2. *It seems* the section simply means

that the magistrate or court before whom the child is brought, knowing the authority of the different institutions to receive and retain minors, and the limitations upon that authority, may select from among them the one he deems most fitting, and the one so selected takes and holds the child for the time, in the manner and under the regulations prescribed by its fundamental law. *Id.*

3. Where, therefore, a boy nine years of age was committed for begging to said protectory, to remain under its guardianship "until therefrom discharged in manner prescribed by law," no notice of the commitment having been given to the father of the child, and upon returns to a writ of *certiorari* and to a writ of *habeas corpus* to inquire into the cause of the commitment, which writs were issued more than twenty days after the commitment, the boy was discharged. *Held* no error. *Id.*

DIVORCE.

1. In July, 1844, defendant, who was then residing in Toronto, Canada, married K., in this State and lived with him here as his wife until January, 1860, when she left him and returned to Toronto, where she continued to reside until 1865. K. removed to, and became a resident of Ohio, and in 1864, after a residence there of more than a year, he commenced an action in that State for divorce on the ground that defendant had been willfully absent from him for more than three years. A copy of the petition and summons were mailed to defendant at Toronto, and were received by her. Notice of the filing of the petition, the purpose thereof, the time for hearing, and that depositions would be taken at Toronto at a time and place named, was duly published. Depositions were taken in pursuance of said notice, defendant being present but taking no part personally or by counsel. No other service was made upon defendant; the service made was,

under the laws of Ohio, a legal service. A divorce was granted in 1884. By the terms of the decree, each party was "restored to the rights and privileges of unmarried persons." Defendant afterward married the plaintiff, and they lived together as husband and wife until 1880. Plaintiff, prior to his marriage, knew of defendant's former marriage and of the divorce proceedings, but not of the particular circumstances under which the decree of divorce was obtained. At the time of such marriage K. was and is still living in Ohio. In an action to have the marriage between the parties annulled, on the ground that defendant, at the time of such marriage, had a husband living, and that her former marriage was still in full force, *held* (MILLER, DANFORTH and FINCH, JJ., dissenting), that the Ohio court acquired no jurisdiction over the defendant and the decree of divorce was, as to her, inoperative and void; that, therefore, the marriage between her and plaintiff was illegal and void. *O'Dea v. O'Dea.* 23

2. In a civil action the fact of adultery may be established by proof of such facts and circumstances, as, under the rules of evidence, are competent to be proved, and which satisfy the mind of the tribunal required to pass upon the question of the truth of the charge. It is not necessary to satisfy the mind beyond a doubt, or to lead the judgment as a necessary conclusion to the determination that adultery has been actually committed. *Allen v. Allen.* 658

3. No different standard of judgment applies to such a case from that which, in ordinary transactions, guides the conclusions of intelligent and conscientious men. *Id.*

DRAINAGE.

Commissioners of sewage and assessment of the city of Brooklyn, in pursuance of the authority given

them by statute (Chap. 521, Laws of 1857; chap. 130, Laws of 1861), established a drainage district, not theretofore drained, over the lands of plaintiff, and a plan of drainage which contemplated the construction of a main sewer into which several sewers to be constructed from time to time should empty. The main sewer was built in 1863, and subsequently various lateral sewers. Soon after the completion of the main sewer, actual use demonstrated that it was insufficient to carry off the sewage turned into it, and at times this was forced through the man-holes and inundated plaintiff's premises, inflicting serious injury. These inundations increased in frequency as new lateral sewers were connected with the main trunk, and became well known to the municipal officers. Notwithstanding this the city continued to build and attach lateral sewers, increasing from year to year the evil produced by the defects in the original plan. In an action to recover damages, *held*, that the city was liable; that having by the exercise of its power created a private nuisance on plaintiff's premises, it incurred a duty of adopting such measures as should abate the nuisance, and having the power to perform it, its omission to do so renders it liable. *Seifert v. City of B'klyn.* 136

DURESS.

1. Payment to an officer who has a valid warrant for the collection of an assessment valid on its face, but in fact void, and who threatens to execute the same, is not a voluntary payment. *Bruecher v. Village of Port Chester.* 240
2. A master may carry on his business with an old machine not provided with all the safeguards attached to newer machines; he may discharge a servant employed to run it, who refuses to perform his stipulated service, and a threat to do so is not coercion, which will make the master liable for injuries to the servant resulting from the

use of the machine. *Sweeney v. B. & J. E. Co.* 520

EASEMENT.

— When description in deed bounding land conveyed by the side of a street conveys no easement in the street.

See K. C. Co. v. Stevens. 411

— When the word "appurtenance" in a deed insufficient to pass a right of way, and when such an easement does and when it does not pass by deed.

See Longendyke v. Anderson. (Mem.) 625

EJECTMENT.

1. The provisions of the Code of Civil Procedure (§§ 1496, 1531), providing for recovery in an action of ejectment as damages for withholding the property, "the rents and profits, or the value of the use and occupation of the property," may be regarded as the legislative definition of the ancient technical term "mesne profits." *Wallace v. Berdell.* 13

2. The owner of the property withheld is not confined to the rents actually received by the party required to make restitution. The owner should have either these or the rental value, as may be just under the circumstances. *Id.*

3. The *mesne* profits consist of the net rents, rental value, or value of the use and occupation, and in ascertaining either, all necessary payments for taxes and ordinary repairs are to be deducted. *Id.*

4. Since the passage of the acts in relation to the property of married women there is no presumption that the husband is in occupation of his wife's lands, and in an action of ejectment brought against the husband to recover possession of such lands, whether she was occupying them at the time of the commencement of the action, or had given to her husband the possession, is to be determined as

a question of fact. *Martin v. Rector.* 77

5. In an action of ejectment, to recover possession of a small triangular piece or parcel of land, it appeared that the land in question was, prior to 1806, included in a lot known as "the saw-mill lot," and within the courses and distances as given in the deed of said lot. In that year the owner of said lot and the owner of land adjoining it on the south entered into an arrangement to "square the line" between the lots, by which a line was located cutting off said parcel from the saw-mill lot. A fence was built upon said line which was replaced in 1820 by a heavy stone wall. From the time of the location of the line up to 1873, the land in question was inclosed and occupied as part of plaintiff's lot by him and his predecessors in title and the lot north of the line was known as the "saw-mill lot." In 1873, a partition suit was commenced to which plaintiff was made a party. The defendants' premises sought to be partitioned were described as being part of the lot "known as the saw-mill lot;" following this the courses and distances were given, as in the old deed of said lot. The land sought to be partitioned was sold under the judgment in said action, and defendant J., claiming as tenant of defendant A., the grantee, under said sale, took possession of the parcel in question. The person under whom the plaintiffs in the partition suit claimed was a party to the location of the line; he devised it as the premises "known as the old saw-mill premises." *Held*, that plaintiff was not precluded by the judgment in the partition suit from claiming title to the land in question; that the testator must have intended to devise the premises north of the stone wall; that the words "known as the saw-mill lot," in the description in the partition action, were the controlling descriptive words, and as at the time when the said action was commenced and for more than fifty years prior thereto the lot so known was north of the wall, the judg-

- ment and sale in partition did not embrace the land in question. *Muston v. Olcott.* 153
6. It was claimed that plaintiff was equitably estopped by statements made by him, at the time he was served with the complaint in the partition suit, to the attorney for the plaintiff therein. It did not appear that these statements were communicated to any of the parties or that it influenced the action of the attorney. *Held*, that the claim was untenable. *Id.*
7. Plaintiff bid off the premises on the partition sale for one of the other parties to the action. *Held*, this was not an admission that the premises included the land in question. *Id.*
8. A survey was made after the partition sale with a view of ascertaining the location of the premises according to the courses and distances in the deed, and plaintiff pointed out the places where the old monuments were located. *Held*, that this in no way prejudiced his legal rights. *Id.*
9. After J. had taken possession he brought an action of trespass in justice's court, against plaintiff for the entry of the cattle of the latter upon the land in question, of which his complaint alleged he was in possession. The answer was a denial and an averment of possession in the defendant in that action for more than twenty years. There was no plea of title, and the evidence on the trial related merely to the question of actual possession at the time of the alleged trespass. J. recovered a judgment. *Held*, that the judgment did not conclude on the point of title and in no way affected it. Also *held*, that as A., the real defendant in interest here, was not a party to the justice's court suit, as a judgment upon the title for or against J. would not have bound her, and as estoppels must be mutual, even if the question of title had been involved in that suit, it did not estop plaintiff here. *Id.*
10. *It seems* that a judgment in ejectment against a tenant at the suit of a stranger does not bind the landlord unless he has been brought in and made a party, in fact or in substance, to the litigation. *Id.*
11. The rule that estoppels bind parties and their privies applies only to a privity arising after the event out of which the estoppel arises. *Id.*
12. *It seems* the remedy of a purchaser of real estate, if the vendor refuses to surrender the possession, is by action of ejectment alone, in which he may recover damages by way of mesne profits for the unlawful withholding or possession. *Preston v. Hawley.* 586
13. Where plaintiff in an action of ejectment claims title in fee to the whole premises, and recovers judgment in accordance with his claim, and where the title set up is in fact invalid, but it appeared on the trial that plaintiff has an independent and unimpeachable title to an undivided share of the premises, it is in the discretion of the General Term, either to modify the judgment or to reverse it and grant a new trial; and its determination in the exercise of this discretion is not reviewable here. *Van Horns v. Campbell.* 608

EMINENT DOMAIN.

— Where railroad corporation makes application to acquire title to uplands on bank of river, it is no objection, on appeal from order confirming report of commissioners awarding damage, that the company propose to build an embankment in front of owner's premises cutting his pier off from river. If his rights have been unlawfully interfered with his remedy is by action, not by appeal.

See In re N. Y., W. S. & B. R. R. Co. (Mem.) 685

ESTOPPEL.

1. A bill of exchange implies a representation by the drawer that the drawee is in funds to meet it,

and the contract of the former is that the latter will accept and pay according to the terms of the bill; the subsequent acceptance constitutes an admission of the truth of the representation, which the drawee and acceptor is not thereafter allowed to retract as against a *bona fide* holder. *Heuermatte v. Morris.* 63

2. In an action of ejectment, to recover possession of a small triangular piece or parcel of land, it appeared that the land in question was, prior to 1806, included in a lot known as the "saw-mill lot," and within the courses and distances as given in the deed of said lot. In that year the owner of said lot and the owner of land adjoining it on the south entered into an arrangement to "square the line" between the lots, by which a line was located cutting off said parcel from the saw mill lot. A fence was built upon said line which was replaced in 1820 by a heavy stone wall. From the time of the location of the line up to 1873, the land in question was inclosed and occupied as part of plaintiff's lot by him and his predecessors in title and the lot north of the line was known as the "saw-mill lot." In 1873, a partition suit was commenced to which plaintiff was made a party. The defendants' premises sought to be partitioned were described as being part of the lot "known as the saw-mill lot;" following this the courses and distances were given, as in the old deed of said lot. The land sought to be partitioned was sold under the judgment in said action, and defendant J., claiming as tenant of defendant A., the grantee, under said sale, took possession of the parcel in question. The person under whom the plaintiffs in the partition suit claimed was a party to the location of the line; he devised it as the premises "known as the old saw-mill premises." *Held*, that plaintiff was not precluded by the judgment in the partition suit from claiming title to the land in question; that the testator must have intended to devise the premises north of the stone

wall; that the words "known as the saw-mill lot," in the description in the partition action, were the controlling descriptive words, and as at the time when the said action was commenced and for more than fifty years prior thereto the lot so known was north of the wall, the judgment and sale in partition did not embrace the land in question. *Masten v. Olcott.* 153

3. It was claimed that plaintiff was equitably estopped by statements made by him, at the time he was served with the complaint in the partition suit, to the attorney for the plaintiff therein. It did not appear that these statements were communicated to any of the parties or that they influenced the action of the attorney. *Held*, that the claim was untenable. *Id.*
4. After J. had taken possession he brought an action of trespass in justice's court against plaintiff for the entry of the cattle of the latter upon the land in question, of which his complaint alleged he was in possession. The answer was a denial and an averment of possession in the defendant in that action for more than twenty years. There was no plea of title, and the evidence on the trial related merely to the question of actual possession at the time of the alleged trespass. J. recovered a judgment. *Held*, that the judgment did not conclude on the point of title and in no way affected it. Also *held*, that as A., the real defendant in interest here, was not a party to the justice's court suit, as a judgment upon the title for or against J. would not have bound her, and as estoppels must be mutual, even if the question of title had been involved in that suit, it did not estop plaintiff here. *Id.*
5. *It seems* that a judgment in ejectment against a tenant at the suit of a stranger does not bind the landlord unless he has been brought in and made a party, in fact or in substance, to the litigation. *Id.*
6. The rule that estoppels bind parties and their privies applies only

to a privity arising after the event out of which the estoppel arises.
Id.

7. In an action by a tax payer of the town of A., to have certain bonds issued by said town adjudged illegal and void, it appeared that the town, acting in supposed accordance with statutory provisions (Chap. 907, Laws of 1869, as amended by chap. 925, Laws of 1871) issued its bonds to pay for stock of a railroad corporation, which passed into the hands of innocent holders. The bonds were claimed by the town to have been illegally issued, and so invalid. While suits were pending to enforce them, said town, under the act of 1880 (Chap. 146, Laws of 1880), authorizing it "to issue new bonds pursuant to the provisions of chapter 75, Laws of 1878," and its amendments, to the amount and extent of its bonded indebtedness, issued the bonds in question in exchange for, and to retire the outstanding bonds, the new bonds drawing a lower rate of interest than the old ones. Said town at the time had no other "bonded indebtedness" than the original bonds issued as above stated. *Held*, that the action was not maintainable; that the town having elected to compromise rather than to contest the validity of the old bonds, was estopped from thereafter questioning it. *Hills v. Peekskill Sngs. Bk.* 490

8. The parties entered into a contract by which defendants agreed to sell the goods manufactured by plaintiff on commission. Plaintiff guaranteed to supply defendants with goods to at least the value of a sum specified, and in case of failure so to do, defendants were entitled to the agreed commissions on that sum. Either party had the right to terminate the agreement by giving to the other a year's notice. In an action to recover proceeds of sales in defendants' hands, the referee found that plaintiff was led, by acts and assurances of defendants, to believe that they would only charge commissions thereafter on actual shipments and were induced

thereby to refrain from giving notice of a termination of the agreement. *Held*, that defendants were estopped from claiming thereafter commissions under the guaranty in the contract. *Belgian Glass Co. v. Pabst.* 621

—When party is precluded in action to restrain sale for unpaid assessment for a local improvement by order of confirmation in the assessment proceedings from raising objections as to matters which might have been corrected on appeal from report of commissioners.

See *Tungus v. Village of Port Chester.* 291

EVIDENCE.

1. In a pass-book issued by defendant to a depositor was a printed by-law, a portion of which is as follows: "All payments made by the bank upon the presentation of the pass-book, and duly entered therein, will be regarded as binding upon the depositor; money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass-book." Defendant made a payment to a stranger whose only evidence of authority to receive it was the possession of the pass-book. *Held*, that it was error for the trial court to exclude evidence tending to show want of care and prudence on the part of the bank in making such payments. *Smith v. B'klyn Sngs. Bk.* 58
2. Where, upon the trial of an indictment for abortion, a physician who after the commission of the alleged crime attended upon the female upon whose person it was alleged to have been committed, was allowed to give, as a witness for the prosecution, his opinion as a medical expert, that the crime had been committed, founded upon what he observed as to the physical condition of the woman and upon her narrative of the facts, and it appeared that she was alive at the time of the trial. *Held* error. *People v. Murphy.* 126

3. Also *held*, the fact that the physician was selected and sent by the public prosecutor to attend upon the female did not affect the question, that as she accepted his services in his professional character the relation of physician and patient was established between them. *Id.*
4. Also *held*, that although she was a party to the crime, her declarations, which were simply a narrative of a past transaction and constituting no part of the *res gestæ*, were not admissible. *Id.*
5. The parties entered into a contract by which defendant agreed that, if plaintiffs should succeed in selling fifty of the defendant's sewing machines to one firm or party in Mexico, during a trip of their agent about to be made, for every fifty machines so sold they should have the sole agency for the sale of said machines in that locality, and defendant agreed to furnish the machines. Plaintiffs' agent made two sales of fifty machines to persons in different localities in Mexico under an agreement that the purchaser should be the sole agent for the sale of the machines in that locality; one of the orders defendant filled, the other it refused, and refused to fill further orders from plaintiffs or their agents, and repudiated the contract. In an action to recover damages for breach of the contract, plaintiff offered to show on the trial, that, subsequent to the repudiation of the agreement, defendant established agencies in Mexico, and the number of machines sold through them. This was excluded. *Held* error. *Wakeman v. W. & W. Mfg. Co.* 205
6. But *held*, that the opinions of witnesses as to the value of the agreement, the profits which it, or any agency established in pursuance of it, could produce, the damages realized, and as to the number of machines they could have sold, were properly excluded. *Id.*
7. In an action to recover damages for breach of a contract to form and continue a partnership for a specified term, the opinion of the witnesses as to the value of the contract to plaintiff, or as to what would have been his share of the profits had the contract been carried out, is incompetent and its reception error. *Reed v. McConnell.* 270
8. A policy of fire insurance was upon plaintiffs' interest, which was an undivided half of the buildings insured. An allowance was made by the arbitrators for the expense of removing the machinery in the buildings preparatory to the work of repair. Defendant offered to prove that plaintiff's co-tenant had received an award from other insurance companies, in which was included the expense of removing the machinery. *Held*, that the evidence was properly rejected, as the proof would not affect defendant's liability. *Clover v. Greenwich Ins. Co.* 277
9. The policy contained a clause providing that it should be optional for defendant to repair or rebuild within a reasonable time, giving notice of its intention so to do within sixty days after completion of the proofs of loss therein required. Defendant, on the next day after the award, refused to pay; it offered to prove that three days thereafter it offered to repair; this was rejected. *Held* no error; that the proofs referred to in the clause in reference to repairs were the proofs required to be furnished within thirty days, not to any subsequent proceedings to ascertain amount of loss; and that the option terminated when a right of action accrued to plaintiff upon the policy. *Id.*
10. Defendant contracted to sell plaintiff ten car-loads of iron — "(C) Blooms" — to be delivered "as fast as they may be produced, small enough to meet the usual requirements of measure." Five car-loads were delivered. In an action to recover damages for non-delivery of the residue, evidence was offered on the part of

- plaintiffs and received under objection, that defendant stated, at the time the contract was made, that he could produce a car-load of blooms for delivery every ten days. *Held* no error. *Stewart v. Marvel*. 357
11. In an action against a railroad company to recover for injuries sustained at a crossing, where the negligence alleged was the failure to ring a bell or blow a whistle as the train approached the crossing, testimony of passengers on the train, who were in a position to have heard, that they did not hear either of these signals, is competent, although it does not affirmatively appear that they were looking, watching or listening therefor. *Greany v. L. I. R. R. Co.* 419
12. When a deed has been duly acknowledged, although there appears to have been a subscribing witness, it is not necessary to call him for the purpose of proving its execution. *Simmons v. Havens*. 427
13. In an action of ejectment, plaintiff claimed title under a deed which she alleged had been executed and delivered to her by her mother, who afterward obtained possession thereof and destroyed it, and then deeded the land to defendant, who had full knowledge of the previous conveyance. *Id.*
14. S., plaintiff's husband, after having testified as a witness in her behalf, that defendant exhibited the deed to him, testified on cross-examination that he asked her to see the deed. He was then allowed to state on re-direct examination, under objection and exception, that before he asked to see the deed, plaintiff told him she had a deed of the premises. *Held* no error. *Id.*
15. Plaintiff's mother died before the trial; plaintiff was allowed to testify that she had the deed in her possession, and that the signature thereto was in the handwriting of her mother. *Held*, that this was not a violation of section 829 of the Code of Civil Procedure; that it did not involve a personal transaction between her and her mother and so was competent. *Id.*
16. Plaintiff was also allowed to testify to conversations between her mother and defendant, in which it did not appear that she took any part. *Held* no error. *Id.*
17. Where the answer in an action was a general denial, and defendant on the trial offered to prove that after the commencement of the action plaintiff was adjudged a bankrupt and the cause of action passed to his assignee, which offer was rejected. *Held* no error. *Styles v. Fuller*. 622
- To vary contract of marine insurance, when not competent. *See Snowden v. Guion*. 458
- When, upon question of market value, proof of actual contracts of sale proper. *See B. P. & H. D. Establishment v. Wharton*. (Mem.) 631
- When oral evidence incompetent to change or explain contract, the language of which is unambiguous. *See People, ex rel., v. Commissioners*. (Mem.) 638

EXAMINATION OF PARTY.

The Code of Civil Procedure (§§ 870, 876) authorizes the granting of an order, before an action has actually commenced in a court of record, for the examination of a person against whom such an action is "about to be brought," upon the application of the person who is about to bring the action. *Mer. Nat. Bk. v. Sheehan*. 176

EXCEPTIONS.

The provision of the Code of Criminal Procedure (§ 527, as amended by chapter 360, Laws of 1882), authorizing the appellate court to order a new trial in a criminal action, although no exceptions were taken

on trial, applies only to the Supreme Court; this court has no authority to review the judgment unless exceptions have been duly and properly taken. *People v. Donovan*. 632

EXCISE.

An indictment under the provision of the excise law of 1857 (Laws of 1857, chap. 625, § 14), prohibiting the sale of intoxicating liquors, to be drank on the premises, without a license therefor, "as an inn, tavern or hotel-keeper," is sufficient which alleged a sale of certain specified liquors, among them ale and beer, without such a license, although it does not negative a license, as authorized by the Amendatory Act of 1869, to sell ale and beer. (Laws of 1869, chap. 858, § 4.) *Jefferson v. People*. 19

EXECUTION.

1. The court has no authority to impose as a condition of granting an order to set aside an execution against the person, unlawfully issued, that defendant shall stipulate not to sue for damages for an arrest under the unlawful process; nor does the fact that the order awards costs, authorize the condition. *Chapin v. Foster*. 1
2. The complaint in this action alleged in substance that plaintiff, having in his possession certain property pledged to him as security for a debt, delivered the same to the defendant under an agreement between the parties and the pledgor, that defendant should receive the property, sell the same, and out of the proceeds pay plaintiff's claim; that defendant sold the property and has in his possession sufficient of the avails to pay plaintiff's debt, but refuses so to do. *Held*, that the action was *ex contractu* and no order of arrest having been issued therein a judgment in plaintiff's favor did not authorize an execution against the person. (Code of Civ. Pro., § 549.) *Id.*

— *It seems a judgment in replevin, when no damages have been assessed or value of property found, can only be enforced by execution, not by punishment for contempt.*

Ses Hammond v. Morgan. 179

EXECUTOR AND ADMINISTRATOR.

1. The will of E., after a bequest to C. of a bond and mortgage executed by James Davis, contained a bequest to J. as follows: "The sum of \$243.92, a portion of the debt due me from the said James Davis, secured by his notes;" then followed a similar gift to the plaintiff; the legatees were infant sons of Davis. At the time of the making of the will and at the time of his death, the testator held a note against said Davis for the amount of the two sums thus bequeathed. Defendant was executor of the will. At the time of the death of the testatrix, plaintiff was about five years old. About four years thereafter he surrendered the note to Davis, taking in lieu thereof two notes, one payable on demand to each of the legatees for his one-half. After settlement of his accounts as executor, defendant tendered plaintiff's note to the mother of the legatees, but she refused to receive it, and requested him to keep it until plaintiff should come of age; he accordingly retained it. Davis was perfectly responsible up to two or three years before plaintiff became of age, when he became insolvent and unable to pay the note. In an action brought by plaintiff after he became of age to recover the amount of the note and interest, *held*, that he was entitled to recover; that as the gift was a specific legacy, and not needed for any purposes of administration, defendant, after the expiration of one year from the granting of letters testamentary, should have delivered the original note to the legatees; that if he could not deliver it to them jointly it was proper to take two notes as he did, that as the plaintiff was a minor and so a delivery could not be made to him, and as a de-

livery to his mother would not discharge defendant, if he desired to relieve himself from responsibility he should have procured the appointment of a guardian (3 R. S. 151, § 5, as amended by § 44, chap. 460, Laws of 1837), to whom he could have delivered the note. Also *held* that, assuming defendant was under no obligation to have a guardian appointed, and after the accounting owed no duty as executor in reference to the note, by retaining possession and control of it he became trustee thereof for plaintiff and should have used efforts to secure or collect it. *Davis v. Crandall.* 811

2. No citation for defendant's accounting as executor was served upon plaintiff, who was then about nine years old; it was served upon his mother, who was also a legatee. Upon the return day of the citation an attorney was appointed special guardian for plaintiff. No mention was made in the account of the surrender of the original note, or of the taking of the two in place thereof, nor was any mention of the latter made in the accounting, or the decree. *Held*, that said decree was not final or conclusive as against plaintiff. *First*, Because the surrogate had no jurisdiction to appoint such special guardian, and the decree was not binding upon plaintiff, he not having been served with a citation as required by the statute. (2 R. S. 93, § 61.) *Second*, Because there was no adjudication upon the accounting in respect to the note. *Id.*

3. The will of W., after directing the payment of debts and expenses, named six persons as "executors of and trustees under" it. A series of separate trust estates were constituted, running for the lives of the specified beneficiaries. Some of these required specific sums to be set apart, others provided for the severance of the trust estates from the general assets, and their management by five of the six persons so named, holding as trustees. A large portion of the trust estate consisted of

real estate, and provision was made for partition. Authority was conferred upon the trustees to lease and to sell certain portions, and general authority for the management of the land. The trustees were also empowered, in their discretion, to commit, by revocable power of attorney, the management of certain of the trust estates to the beneficiary. The accounts of the executors as such were settled, leaving in their hands only the trust estates, which were severed from the general assets, and thereafter separate accounts were kept with each beneficiary. *Held*, that by the will the testator contemplated and provided for two separate duties to be performed by his representatives, first as executors, and thereafter as trustees, and that they were entitled to commissions in both capacities, but that they were not entitled to commissions on the value of the real estate unsold at the termination of the trusts. *Phenix v. Livingston.* 451

4. An administrator or executor who makes, indorses or accepts negotiable paper is personally liable thereon, although he adds to his signature the name of his office; he cannot bind the assets of the deceased by his contracts. *Schmittler v. Simon.* 554

5. A draft drawn upon an executor of the estate of the mother of the drawer contained an absolute direction to pay a fixed sum at a specified date, with interest to the payee or order; then followed these words: "and charge the amount against me, and of my mother's estate." The draft was accepted by the executor, the word "executor" being added to his signature. In an action upon the acceptance, *held*, that the reference in the draft to the estate was not a direction to pay out of it, but it was simply referred to as a means of reimbursement; that the instrument was valid as a bill of exchange; and that the defendant was liable absolutely and individually. *Id.*

FACTOR.

The parties entered into a contract by which defendants agreed to sell the goods manufactured by plaintiff on commission. Plaintiff guaranteed to supply defendants with goods to at least the value of a sum specified, and in case of failure so to do defendants were entitled to the agreed commissions on that sum. Either party had the right to terminate the agreement by giving to the other a year's notice. In an action to recover proceeds of sales in defendants' hands, the referee found that plaintiff was led, by acts and assurances of defendants, to believe that they would only charge commissions thereafter on actual shipments, and were induced thereby to refrain from giving notice of a termination of the agreement. *Held*, that defendants were estopped from claiming thereafter commissions under the guaranty in the contract. *Belgian Glass Co. v. Pabst*. 621

FALSE IMPRISONMENT.

— in action for false imprisonment, where no malice was shown, the court charged that plaintiff was entitled to a fair compensation which was made up of the loss of time and the insult and humiliation put upon the plaintiff by the arrest, on exception to the latter part of charge, *held*, it was erroneous; that it was the province of the jury to determine whether plaintiff had suffered insult or humiliation, but the charge assumed these elements of damages did exist, and required the jury to assess the damages with that assumption.

See Catlin v. Pond. (Mem.) 649

FEES.

See COMMISSIONS.

FORECLOSURE.

1. The act of 1883 (Chap. 878, Laws of 1883), in relation to receivers of

corporations, including the second section thereof, in reference to receiver's fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in said section. *U. S. Trust Co. v. N. Y., W. S. & B. R. Co.* 478

2. The allowance of commissions to such a receiver is governed by the provision of the Code of Civil Procedure (§ 8320), providing for the allowance by the court or the judge where not "otherwise specially prescribed by statute." *Id.*

FOREIGN JUDGMENT.

In July, 1844, defendant, who was then residing in Toronto, Canada, married K., in this State, and lived with him here as his wife until January, 1860, when she left him and returned to Toronto, where she continued to reside until 1865. K. removed to, and became a resident of Ohio, and in 1864, after a residence there of more than a year, he commenced an action in that State for divorce on the ground that defendant had been willfully absent from him for more than three years. A copy of the petition and summons were mailed to defendant at Toronto, and were received by her. Notice of the filing of the petition, the purpose thereof, the time for hearing, and that depositions would be taken at Toronto at a time and place named, was duly published. Depositions were taken in pursuance of said notice, defendant being present but taking no part personally or by counsel. No other service was made upon defendant; the service made was, under the laws of Ohio, a legal service. A divorce was granted in 1864. By the terms of the decree, each party was "restored to the rights and privileges of unmarried persons." Defendant afterward married the plaintiff, and they lived together as husband and wife until 1880. Plaintiff,

prior to his marriage, knew of defendant's former marriage and of the divorce proceedings, but not of the particular circumstances under which the decree of divorce was obtained. At the time of such marriage K. was and is still living in Ohio. In an action to have the marriage between the parties annulled, on the ground that defendant, at the time of such marriage, had a husband living, and that her former marriage was still in full force, *held* (MILLER, DANFORTH and FINCH, JJ, dissenting), that the Ohio court acquired no jurisdiction over the defendant and the decree of divorce was, as to her, inoperative and void; that, therefore, the marriage between her and plaintiff was illegal and void. *O'Dea v. O'Dea.* 23

FORMER ADJUDICATION.

1. At a meeting of the board of supervisors of the county of U. bills of expenses, duly verified, incurred by it on appeal by defendant in equalization proceedings, were presented. In proceedings by *mandamus* to compel the common council of the city to levy and collect the sum audited, it appeared that the city had previously procured a writ of *certiorari* to review the proceedings of the board in auditing the accounts and assessing them upon the city. The writ was dismissed by the General Term. *Held*, that its order was not *res adjudicata* as to the validity of the assessment, as the allowance or refusal of the writ was in the discretion of the court, and that the character of the order as a discretionary one was not altered by the fact that it appears in the opinion of the court that it examined the proceedings and considered them regular. *People, ex rel. Suprs. Ulster Co., v. Common Council.* 82
2. In an action of ejectment, to recover possession of a small triangular piece or parcel of land, it appeared that the land in question was, prior to 1806, included in a lot known as "the saw-mill lot,"

and within the courses and distances as given in the deed of said lot. In that year the owner of said lot and the owner of land adjoining it on the south entered into an arrangement to "square the line" between the lots, by which a line was located cutting off said parcel from the saw-mill lot. A fence was built upon said line which was replaced in 1820 by a heavy stone wall. From the time of the location of the line up to 1873, the land in question was inclosed and occupied as part of plaintiff's lot by him and his predecessors in title and the lot north of the line was known as the "saw-mill lot." In 1873, a partition suit was commenced to which plaintiff was made a party. The defendant's premises sought to be partitioned were described as being part of the lot "known as the saw-mill lot;" following this the courses and distances were given, as in the old deed of said lot. The land sought to be partitioned was sold under the judgment in said action, and defendant J., claiming as tenant of defendant A., the grantee, under said sale, took possession of the parcel in question. The person under whom the plaintiffs in the partition suit claimed was a party to the location of the line; he devised it as the premises "known as the old saw-mill premises." *Held*, that plaintiff was not precluded by the judgment in the partition suit from claiming title to the land in question; that the testator must have intended to devise the premises north of the stone wall; that the words "known as the saw-mill lot," in the description in the partition action, were the controlling descriptive words, and as at the time when the said action was commenced and for more than fifty years prior thereto the lot so known was north of the wall, the judgment and sale in partition did not embrace the land in question. *Masten v. Olcott.* 152

3. After J. had taken possession he brought an action of trespass in justice's court against plaintiff for the entry of the cattle of the latter

upon the land in question, of which his complaint alleged he was in possession. The answer was a denial and an averment of possession in the defendant in that action for more than twenty years. There was no plea of title, and the evidence on the trial related merely to the question of actual possession at the time of the alleged trespass. J. recovered a judgment. *Held*, that the judgment did not conclude on the point of title and in no way affected it. Also *held*, that as A., the real defendant in interest here, was not a party to the justice's court suit, as a judgment upon the title for or against J. would not have bound her, and as estoppels must be mutual, even if the question of title had been involved in that suit, it did not estop plaintiff here. *Id.*

4. It seems that a judgment in ejectment against a tenant at the suit of a stranger does not bind the landlord unless he has been brought in and made a party, in fact or in substance, to the litigation. *Id.*

5. The will of E., after a bequest to C. of a bond and mortgage executed by James Davis, contained a bequest to J. as follows: "The sum of \$243.92, a portion of the debt due me from the said James Davis, secured by his notes;" then followed a similar gift to the plaintiff; the legatees were infant sons of Davis. At the time of the making of the will and at the time of his death, the testator held a note against said Davis for the amount of the two sums thus bequeathed. Defendant was executor of the will. At the time of the death of the testatrix, plaintiff was about five years old. About four years thereafter he surrendered the note to Davis, taking in lieu thereof two notes, one payable on demand to each of the legatees for his one-half. After settlement of his accounts as executor, defendant tendered plaintiff's note to the mother of the legatees, but she refused to receive it, and requested him to keep it until plaintiff should come of age. He accord-

ingly retained it. Davis was perfectly responsible up to two or three years before plaintiff became of age, when he became insolvent and unable to pay the note. In an action brought by plaintiff after he became of age, to recover the amount of the note and interest, it appeared that no citation for defendant's accounting as executor was served upon plaintiff, who was then about nine years old, it was served upon his mother, who was also a legatee. Upon the return day of the citation an attorney was appointed special guardian for plaintiff. No mention was made in the account of the surrender of the original note, or of the taking of the two in place thereof, nor was any mention of the latter made in the accounting, or the decree. *Held*, that said decree was not final or conclusive as against plaintiff. *First*, Because the surrogate had no jurisdiction to appoint such special guardian, and the decree was not binding upon plaintiff, he not having been served with a citation as required by the statute. (2 R. S. 93, § 61.) *Second*, Because there was no adjudication upon the accounting in respect to the note. *Davis v. Crandall.* 311

6. A judgment in a former suit between the same parties is a bar to a subsequent action only when the point or question in issue is the same in both; the former judgment has no effect upon questions not involved in it, which were not then open to inquiry or the subject of litigation. *Marsh v. Masterton.* 401
7. Plaintiff brought an action against defendant, the complaint in which alleged a partnership between them, and asked for a dissolution thereof, the appointment of a receiver, and an accounting, etc. The answer was a general denial. On the trial it was found as matter of fact that no copartnership existed, and the complaint was dismissed. Plaintiff then brought this action to recover for labor and services alleged to have been rendered under an agreement between the parties, by which he was employed

to oversee, take charge of, carry on, and labor in the business of the defendant, and the latter agreed to pay him for such service one-half the profits of the business after deducting interest on the capital invested. Plaintiff asked judgment for his share of the profits. *Held*, that the former judgment was not a bar. *Id.*

8. Plaintiff was duly appointed police commissioner of the city of New York; he duly qualified and entered upon the performance of the duties of the office. Subsequently he was unlawfully removed by the mayor, and defendant appointed for the unexpired term. The latter, on presentation of his certificate of appointment, was recognized by the board of police commissioners, and assumed the duties of the office against the protests of plaintiff, who claimed the appointment was unauthorized. The proceedings of the mayor in removing plaintiff were reversed and annulled on *certiorari*, and thereupon he was again officially recognized by the board, and resumed the duties of his office, during the time of his exclusion he was ready and willing to perform such duties. Defendant drew the salary of the office during the time he performed its duties. *Held*, that an action to recover the amount so received was maintainable; and that the record in the *certiorari* proceedings was properly admitted in evidence against the defendant on the trial of the action. *Nichols v MacLean*. 526

9. As to whether in such case the record, in the absence of collusion or fraud, is conclusive, *quars*. *Id.*

FORMER SUIT PENDING.

1. Where an action was commenced in a State court upon a joint contract by service upon one of the joint contractors, and was upon his motion removed into the U. S. Circuit Court, and a second action was commenced in a State court upon the same contract, by service upon another of the joint contractors,—*Held*, that the pendency of the for-

mer action was not a good ground for setting aside the summons in the second action. *Oncida Co. Bk. v Bonney*. 173

2. *It seems* that a former action in a court of the United States or of another State is no stay or bar to a suit upon the same cause of action in this State; while a recovery in one may be pleaded to the further continuance of the other, until this is obtained both may proceed to judgment and execution, when a satisfaction of one will require a discharge of the other. *Id.*

FRANCHISE.

The "franchises, privileges, rights and liberties," which, under the act of 1878 (Chap. 163, Laws of 1878), a manufacturing corporation is authorized to mortgage, to secure the payment of a debt, upon consent of the requisite number of stockholders, and which are not included in a consent to mortgage the real and personal estate of the corporation, are the corporate rights and franchises which became vested in the company by virtue of its organization as a corporation. Those terms do not include patent rights, licenses, easements, or privileges acquired by the company after its incorporation, either from individuals or other corporations, these are in the nature of property, and are, therefore, included in a consent to mortgage the corporate property. *Lord v. Yonkers Fuel Gas Co.* 614

FRAUDS (STATUTE OF)

See STATUTE OF FRAUDS

FRAUDULENT CONVEYANCES.

1. The fact that a mortgage was given, or *it seems* that property was transferred, by a debtor for a valuable consideration, is not, as a proposition of law, inconsistent with the existence of an intent on the part of the debtor to defraud

his creditors, or of such knowledge thereof, on the part of the mortgagee or purchaser as will avoid the mortgage or conveyance, and in this regard no distinction can be made between the consideration furnished by an existing debt and that arising in any other manner. When there is an actual intent to defraud, no form in which the transaction is put can shield the property transferred from the claim of creditors. *Bullings v. Russell*. 226

2. Proof, therefore, that a mortgage executed by an insolvent debtor was given to secure a debt actually owing by the mortgagor does not, as a matter of law, disprove the existence of a fraudulent intent on the part of the debtor. *Id.*
3. A member of a firm may appropriate his individual property to the payment of the firm debts, and where the firm has made a general assignment for the benefit of its creditors a conveyance by one of its members of his individual property to the assignee, to be disposed of and applied, in accordance with the terms of the assignment, to the payment of the partnership debts, is not *per se* fraudulent or unlawful and void. *Royer Wheel Co. v. Fielding*. 504

GENERAL TERM.

1. Where plaintiff in an action of ejectment claims title in fee to the whole premises, and recovers judgment in accordance with his claim, and where the title set up is in fact invalid, but it appeared on the trial that plaintiff has an independent and unimpeachable title to an undivided share of the premises, it is in the discretion of the General Term, either to modify the judgment or to reverse it and grant a new trial, and its determination in the exercise of this discretion is not reviewable here. *Van Horne v. Campbell*. 608

HIGHWAYS.

1. To authorize the construction of a

railroad upon or over a highway, where individuals own private rights or interests therein, or in the soil thereof, not only must the public right or license be obtained, but the individual rights and interests must be lawfully acquired; and if constructed without such acquisition, the builders are trespassers and are liable for all the damages sustained by the owners of such rights and property, as to whom the railroad is a continuing nuisance. *Uline v. N. Y. C. & H. R. R. Co.* 98

2. Where, however, the railroad is built, with proper care and skill, after the public rights and the private property, if any, in the highway, or the soil thereof, have been acquired, it is not a nuisance, and the owners of the railroad are not responsible for any damages to private property, adjacent or near to the road, necessarily resulting from its construction or operation. *Id.*
3. Where, therefore, a railroad corporation, having acquired all private rights in a city street, and authority from the municipality, raised the grade of the street in front of defendant's adjoining lots so as to conform the grade of the street to the grade of the railroad crossing, it exercising proper care and prudence in doing the work, *held*, in the absence of any allegation or proof that the street as such was in any way injured for travel, or its usefulness unnecessarily impaired, defendant was not liable for the consequential damages to plaintiff's lots; that as the city could have raised the grade of the street without liability to abutting owners, it could authorize the defendant to do so without such liability. *Id.*
4. The defendants who appeal were owners of certain premises in the city of New York which they leased to M., who, under and in accordance with a permit from the city, built vaults under the sidewalk in front thereof, with a coal-hole which was properly constructed, and in the usual and permitted manner. Through the wrongful act of a stranger, who broke the

- stone supporting the iron cover of the coal-hole, the cover turned when plaintiff stepped upon it and he fell and was injured. In an action to recover damages, it did not appear that the appellants had any knowledge or notice of the defect. *Held*, that they were not liable, and *it seems* they would not have been liable had they themselves constructed the vaults lawfully and with due prudence and care, and thereafter transferred possession of the premises to a third person without covenant on their part to repair; that if the coal-hole became a nuisance after the stone was broken only the person who created the nuisance, or he who suffered it to continue, was responsible, and that a party out of possession and control and who had no knowledge, actual or constructive, of the defect could not be said to have suffered it to continue.
Wolf v. Kilpatrick. 146
5. One doing business on a street in a populous city has the right to temporarily obstruct the sidewalk in front of his place of business, for the purpose of loading merchandise; the right, however, is to be exercised in a reasonable manner so as not unnecessarily to incumber the sidewalk; when thus reasonably exercising such right, the occupant of the premises is not required to furnish to those passing upon the sidewalk a safe passage around the obstruction.
Welsh v. Wilson. 254
6. Defendant, for the purpose of removing certain cases of merchandise from his store in the city of New York, placed a pair of skids from a truck across the sidewalk to the steps of the store; after they had been there about three minutes plaintiff came along the sidewalk and seeing the skids attempted to pass around them by the steps, and in so doing slipped upon the steps and was injured. In an action to recover damages, *held*, that defendant owed no duty to the plaintiff to see that the steps were in an absolutely safe condition for travel; and that she was not entitled to recover. *Id.*
7. When authorized by the legislature, a municipal corporation may close a portion of a street, of which it owns the fee, without compensation to owners of lots on the street which do not front upon the portion closed, at least where there is other access to the lots of such owners. *Kings Co. F. Ins. Co. v. Stevens.* 411
8. A turnpike road was laid out running east and west across the land of N. in the city of Brooklyn. Subsequently the city purchased of the turnpike company a portion of said road, "for a public street," which was thereafter used as a street. The expense of the purchase was assessed upon the adjoining land. N. deeded to S. the land south of the street, bounding it on the north by the south line of the street. S. laid it out into city lots; one of these he deeded to defendant. Of those adjoining on the east, plaintiff became the owner. The commissioners appointed under the act of 1835 (Chap. 132, Laws of 1835) to lay out the streets of the city, with authority to close any street or part thereof, "theretofore laid out and not approved by the mayor and common council of said city," determined to close said street. The proceedings of the commissioners were validated and confirmed in 1839 (Chap. 41, Laws of 1839); subsequently buildings were erected east of defendant's lot, which covered the land formerly occupied by the street, except a passage-way four feet wide, south of the center of the street. Plaintiff having obtained a conveyance of this strip from the executors of N., and from the city, built a fence across it, which defendant, claiming a right of way, tore down. Defendant had access to her lot by a passage-way twelve feet wide, to a street on the west. In an action to restrain defendant from interfering with plaintiff's occupation, *held*, that whether the turnpike company owned the fee or an easement, plaintiff acquired the fee either by the deed from the city or from N.'s executors; that the city, with the authority of the legislature, could

close the street, and so far as the *locus in quo* is concerned, could do so without compensation to defendant, and could sell and convey the same; that the street was legally closed; that the description in the deed from N. to S., bounding the land conveyed by the south line of the street, conveyed no private easement but merely recognized an existing public one; that conceding the city was bound to leave open a way by which access could be had to defendant's lot, it was not required to leave more than one; it might choose which of the two to leave, and when it conveyed to plaintiff it made its choice, and plaintiff was entitled to close the one so conveyed. *Id.*

HOLIDAYS.

— *Where notice of application to appoint commissioners in proceedings for local improvements is given for a day which is a public holiday, the appointment of commissioners the next day is at most a mere irregularity, the order is not void. In re Opening of Flushing Avenue. (Mem.)* 678

HUSBAND AND WIFE.

See DIVORCE.

MARRIED WOMEN.

IDIOTS.

See INSANE PERSONS.

INDICTMENT.

1. Where the enacting clause of a statute, forbidding the doing of an act, contains one or more exceptions, an indictment for a violation of the statute must contain averments showing that the case is not within any of the exceptions; but an exception in a subsequent clause or statute is simply matter of defense, and it is not necessary to negative it in the indictment. *Jefferson v. People.*

19

2. Accordingly *held*, that an indictment under the provision of the excise law of 1857 (Laws of 1857, chap. 625, § 14), prohibiting the sale of intoxicating liquors, to be drank on the premises, without a license therefor, "as an inn, tavern or hotel-keeper," was sufficient which alleged a sale of certain specified liquors, among them ale and beer, without such a license, but did not negative a license, as authorized by the Amendatory Act of 1869, to sell ale and beer. (Laws of 1869, chap. 856, § 4.) *Id.*

INFANTS.

1. The section of the Penal Code (§ 291), authorizing and directing the arrest of children found begging, etc., and their commitment "to any charitable, reformatory or other institution authorized by law to receive and take charge of minors," does not repeal, or as to commitments under said act to the New York Catholic Protectory, dispense with the provisions of the charter of said protectory (Chap. 448, Laws of 1863,) or of the Consolidation Act (§ 1618 *et seq.*, chap. 410, Laws of 1882) requiring notice of the commitment to be given to the parents, guardian, etc., of a child so committed, and giving the parents or guardian an opportunity to be heard. *People, ex rel. Van Heck, v. N. Y. Cath. Protectory.* 195

2. *It seems* the section simply means that the magistrate or court before whom the child is brought, knowing the authority of the different institutions to receive and retain minors, and the limitations upon that authority, may select from among them the one he deems most fitting, and the one so selected takes and holds the child for the time, in the manner and under the regulations prescribed by its fundamental law. *Id.*

3. Where, therefore, a boy nine years of age was committed for begging to said protectory, to remain under its guardianship "until therefrom discharged in man-

ner prescribed by law," no notice of the commitment having been given to the father of the child, and upon returns to a writ of *certiorari* and to a writ of *habeas corpus* to inquire into the cause of the commitment, which writs were issued more than twenty days after the commitment, the boy was discharged. *Held* no error. *Id.*

4. The will of E., after a bequest to C. of a bond and mortgage executed by James Davis, contained a bequest to J. as follows: "The sum of \$243.92, a portion of the debt due me from the said James Davis, secured by his notes;" then followed a similar gift to the plaintiff; the legatees were infant sons of Davis. At the time of the making of the will and at the time of his death, the testator held a note against said Davis for the amount of the two sums thus bequeathed. Defendant was executor of the will. At the time of the death of the testatrix, plaintiff was about five years old. About four years thereafter he surrendered the note to Davis, taking in lieu thereof two notes, one payable on demand to each of the legatees for his one-half. After settlement of his accounts as executor, defendant tendered plaintiff's note to the mother of the legatees, but she refused to receive it, and requested him to keep it until plaintiff should come of age. He accordingly retained it. Davis was perfectly responsible up to two or three years before plaintiff became of age, when he became insolvent and unable to pay the note. In an action brought by plaintiff after he became of age to recover the amount of the note and interest, *held*, that he was entitled to recover; that as the gift was a specific legacy, and not needed for any purposes of administration, defendant, after the expiration of one year from the granting of letters testamentary, should have delivered the original note to the legatee; that if he could not deliver it to them jointly it was proper to take two notes as he did; that as the plaintiff was a

minor and so a delivery could not be made to him, and as a delivery to his mother would not discharge defendant, if he desired to relieve himself from responsibility he should have procured the appointment of a guardian (3 R. S. 151, § 5, as amended by § 44, chap. 460, Laws of 1837), to whom he could have delivered the note. Also *held*, that, assuming defendant was under no obligation to have a guardian appointed, and after the accounting owed no duty as executor in reference to the note, by retaining possession and control of it he became trustee thereof for plaintiff and should have used efforts to secure or collect it. *Davis v. Crandall.* 311

5. No citation for defendant's accounting as executor was served upon plaintiff, who was then about nine years old; it was served upon his mother, who was also a legatee. Upon the return day of the citation an attorney was appointed special guardian for plaintiff. No mention was made in the account of the surrender of the original note, or of the taking of the two in place thereof, nor was any mention of the latter made in the accounting, or the decree. *Held*, that said decree was not final or conclusive as against plaintiff. *First*, Because the surrogate had no jurisdiction to appoint such special guardian, and the decree was not binding upon plaintiff, he not having been served with a citation as required by the statute. (3 R. S. 93, § 61.) *Second*, Because there was no adjudication upon the accounting in respect to the note. *Id.*

INJUNCTION.

— *In action to restrain sale of land for non-payment of assessment for local improvement, because of alleged invalidity in the proceedings, plaintiff must establish invalidity complained of.*

See Tingle v. Port Chester. 294

INSANE PERSONS.

1. Plaintiff, at the request of B., de-

posited certain moneys belonging to the latter, with defendant; he made the deposit, however, in his own name, to the credit of a deposit account he then had with defendant, and gave to B. two checks for the amount, which the latter, on February 22, 1869, indorsed and delivered to E. as part consideration for her promise to marry him. On the next day, proceedings *de lunatico inquirendo* were instituted against B. and an inquisition therein, held March tenth, adjudged him to be of unsound mind and that he had been, for a period of six months. Pending the proceeding, an order was made enjoining the defendant from paying over the moneys to any one. On March thirty-first an order was made confirming the inquisition and directing defendant to pay the said moneys to the committee thereby appointed, and on April fifteenth defendant complied with the order. On March sixth, one of the checks was presented to defendant for payment and refused. On March eighth B. was married to E. The other check was presented and payment refused August 28, 1871. In an action to recover the amount so deposited, *held*, that as the money belonged to B. when deposited, although the deposit was in plaintiff's name, it still remained the property of B., and the payment to the committee was a legal payment which discharged defendant; that, assuming there was an equitable right in E. to the money arising out of the antenuptial contract, such equity could not be invoked against the bank, it having no notice of the same when it made payment. *Viets v. Un. Nat. Bk.* 563

2. *It seems* that if any such equitable claim existed it could only be enforced in an action against the committee. *Id.*

3. The committee so appointed brought an action against E. to set aside the marriage on the ground of the alleged lunacy of B. The trial resulted in a finding that, at the time of the marriage, B. was of sound mind and capable of

entering into a marriage contract, and judgment was entered in favor of E. *Held*, that this did not affect the validity of the appointment of the committee or of the payment by defendant. *Id.*

4. After inquisition found and the appointment of a committee of the estate of a lunatic, the court has jurisdiction to direct the application of the estate to the payment of demands existing against it, and this relief may be granted on petition of a claimant. *In re Otis.* 580

5. Where the estate is insufficient to pay the debts, the assets, personal as well as real, must be distributed ratably among all the creditors; the petitioning creditor is not entitled to a preference. *Id.*

6. A claim for rent under a lease to the lunatic, whether accruing before or after the appointment of a committee, has no intrinsic preference over his other debts, and in the absence of some special equity growing out of the circumstances of the particular case, the landlord comes in simply as a general creditor for the rent unpaid. *Id.*

7. *It seems* that if the leased premises are occupied by the committee, and such occupation is to the advantage of the estate, as when it is necessary to carry on or close up the business of the lunatic, the rent accruing during such occupation will be regarded as a reasonable expense incurred by the committee to be paid before the claims of other creditors. *Id.*

8. As, however, the committee takes no title to the estate, he being a mere bailiff to take charge of it, such occupation by him for a time does not make him liable as assignee for the term, it creates no privity of estate between him and the lessor. *Id.*

9. The distinction between such a case and that of a receiver or assignee in bankruptcy pointed out. *Id.*

10. Where, therefore, the committee of the estate of a lunatic con-

tinued to carry on his business, occupying for that purpose premises held by him under a lease for a term of years, and thereafter the committee resigned and a new one was appointed who closed up the business, and upon petition of the landlord that said committee be required to pay rent subsequently accruing, it appeared that the committee had not occupied the premises during any portion of the quarter for which rent was claimed, also that the estate was insolvent, *held*, that the prayer of the petition was properly denied; that he was not entitled to a preference, but simply to come in and share with the other creditors. *Id.*

INSOLVENT DEBTOR.

See DEBTOR AND CREDITOR.

INSURANCE.

Where an insurance company in issuing a policy deals with a party who remains in possession of it after execution, and is alone entitled to receive the amount thereof in case of loss, it is authorized to assume that such party has power to consent to such changes in it before breach, as will inure to the benefit of the insured. This is especially the case when the proposed alteration can neither injuriously affect the right of enforcing the contract or change the application of the moneys collectible thereon. *Martin v. Tradesmen's Ins. Co.* 498

INSURANCE (FIRE).

1. A policy of fire insurance required proofs of loss to be made within thirty days after a fire, and provided that the loss should be payable sixty days after notice thereof and proofs of loss have been received by the company, it also provided that in case of differences in regard to the loss or damage they should be submitted to arbitrators. In an action upon the policy, *held*, that the words "proofs of loss," in the clause in regard to payment, referred to the proofs to be furnished within thirty days, and that an action brought three days after an award by arbitrators, appointed as provided by the policy, but more than sixty days after proofs of loss were served, was not prematurely brought. *Glover v. Greenwich Ins. Co.* 277
2. The insurance was upon plaintiff's interest, which was an undivided half of the buildings insured. An allowance was made by the arbitrators for the expense of removing the machinery in the buildings preparatory to the work of repair. Defendant offered to prove that plaintiff's co-tenant had received an award from other insurance companies, in which was included the expense of removing the machinery. *Held*, that the evidence was properly rejected, as the proof would not affect defendant's liability. *Id.*
3. The policy contained a clause providing that it should be optional for defendant to repair or rebuild within a reasonable time, giving notice of its intention so to do within sixty days after completion of the proofs of loss therein required. Defendant, on the next day after the award, refused to pay; it offered to prove that three days thereafter it offered to repair; this was rejected. *Held* no error; that the proofs referred to in the clause in reference to repairs were the proofs required to be furnished within thirty days, not to any subsequent proceedings, to ascertain amount of loss; and that the option terminated when a right of action accrued to plaintiff upon the policy. *Id.*
4. The policy provided "that the cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured * * * of replacing it" *Held*, this provision assumed that the ascertainment of the cost of replacing is a legitimate method of determining the amount of damages; and that an allowance for the expense of removing machinery from the building preparatory

tory to making repairs was proper; also, as the fact that the machinery belonged to some other person did not necessarily exempt the insured from the necessity and cost of removing it, that fact alone did not prevent such an allowance; also, that the existence of a contract between plaintiff and other persons by which he could compel them to remove the machinery did not diminish defendant's liability. *Id.*

5. Under an arbitration clause in a policy of fire insurance, it is the duty of the parties to the contract to act in good faith to accomplish the appraisalment in the way provided; and if either acts in bad faith so as to defeat the real object of the clause, the other is absolved from compliance therewith; and so, when one arbitration fails from default of one of the parties, the other is not bound to enter into a new arbitration agreement. *Uhrig v. Williamsburgh City F. Ins. Co.* 362

6. Defendant issued a policy upon household furniture which contained a clause providing that in case of failure of the parties to agree as to the amount of a loss, each should appoint one arbitrator, who should select an umpire to act with them in case of disagreement. A loss having occurred and the parties disagreeing, each selected an arbitrator in pursuance of the policy, who failed to agree. Plaintiff's testimony tended to show that he asked the arbitrator selected by defendant to agree with his in appointing an umpire, and asked defendant to select a new arbitrator; but they did not accede to his requests. Defendant's evidence tended to show that subsequently it made an offer to appoint a new arbitrator, and that the one selected by it offered to unite in selecting an umpire, which offer plaintiff refused. Before these offers were made the fragments of the broken and damaged articles insured had been removed under order of the city authorities, so that an appraisal had, to a large extent, become impracticable. There was

also some evidence tending to show that defendant was not acting in good faith to procure a speedy appraisal, but was using the clause in the policy to force a compromise. *Held*, that it was a question for the jury to determine whether there was any breach of the policy on the part of plaintiff; and that a refusal to submit the question to the jury was error. *Id.*

7. J., an agent of defendant, was authorized by it to receive proposals for fire insurance, fix rates, receive moneys and countersign, issue and renew policies which were furnished him in blank, signed by defendant's manager, to be filled by him; he entered the insurance he effected in books kept by him, and made daily and monthly reports to defendant. J. issued a policy to C., which contained a clause providing that it might "be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy, or a receipt is given for the same." In an action wherein plaintiff, as assignor of C., claimed a renewal of the policy, his evidence was to the effect that about a month before the expiration of the policy, J. and C. had a conversation in reference to the insurance, in which C. told J. to renew the policy, and the latter stated he would renew it for another year; a loss occurred after the expiration of the original policy; no renewal receipt was ever executed; no renewal was indorsed on the policy or entry thereof made by J., or report thereof made by him to defendant; the premium was not paid, tendered or otherwise arranged, and no action or further conversation had between J. and C. in regard to the insurance until after the fire, although J. and C. were near neighbors. During six months after the fire, C. made no claim under the policy and gave no notice of his loss. *Held*, that the testimony failed to show, and did not justify a finding of a renewal of the policy. *O'Reilly v. Corp. Lond'n Assurance.* 573

2. The owner of the property withheld is not confined to the rents actually received by the party required to make restitution. The owner should have either these or the rental value, as may be just under the circumstances. *Id.*
3. The *mesne* profits consist of the net rents, rental value, or value of the use and occupation; and in ascertaining either, all necessary payments for taxes and ordinary repairs are to be deducted. *Id.*

MINORS.

See INFANTS.

MISTAKE.

Where, after a settlement and adjustment of an account between the parties, a mistake as to one item thereof is discovered, and an action is brought to correct the mistake, this does not give to the defendant a right to have the whole account opened; the mistake may be corrected and the right of the parties readjusted in regard thereto, but in other respects defendant is bound by the account actually settled, unless he can show some mistake or fraud in the settlement in respect to other items. *Carpenter v. Kent.* 591

MORTGAGE.

1. The provision of the Revised Statutes (1 R. S. 678, § 55), providing for express trusts to sell lands for the benefit of creditors, does not prohibit the grantee of an insolvent debtor from executing a mortgage to secure the payment of specific debts of the grantor in pursuance of a prior oral understanding entered into at the time of the execution of the conveyance. *Royer Wheel Co. v. Fielding.* 504
2. A mortgage so executed is not rendered void by a provision therein requiring any surplus arising on foreclosure sale to be paid over to the mortgagor. *Id.*

3. The "franchises, privileges, rights and liberties," which under the act of 1878 (Chap. 163, Laws of 1878), a manufacturing corporation is authorized to mortgage, to secure the payment of a debt, upon consent of the requisite number of stockholders, and which are not included in a consent to mortgage the real and personal estate of the corporation, are the corporate rights and franchises which became vested in the company by virtue of its organization as a corporation. Those terms do not include patent rights, licenses, easements, or privileges acquired by the company after its incorporation, either from individuals or other corporations; these are in the nature of property, and are, therefore, included in a consent to mortgage the corporate property. *Lord v. Yonkers Fuel Gas Co.* 614

See FORECLOSURE.

— When grantee not bound by assumption clause in deed.
See Kelly v. Geer. (Mem.) 664

MOTIONS AND ORDERS.

1. The court has no authority to impose as a condition of granting an order to set aside an execution against the person unlawfully issued, that defendant shall stipulate not to sue for damages for an arrest under the unlawful process; nor does the fact that the order awards costs authorize the condition. *Chapin v. Foster.* 1
2. *It seems* that if the condition be attached to the award of costs only, it would be proper. *Id.*
3. Where the order imposes such a condition, defendant has the right to appeal from that portion thereof, so long as he has not availed himself of the portion awarding costs; it is not necessary to appeal from the whole order. *Id.*
4. A manufacturing corporation made and published its annual report within twenty days after the 1st day of January, 1878, but through

a mistake of its secretary, to whom it was delivered for that purpose, it was not filed within that time. Upon application to the Supreme Court an order was granted February thirteenth that the report be filed *nunc pro tunc*, and it was filed on that day. In an action by a creditor of the corporation against the trustees, *held*, that the order did not relieve the defendants from the consequence of any default on their part, as the duty to file the report was imposed by statute, and over it the court had no jurisdiction; but that the application was an act by defendants in furtherance of their duty, and an indication of good faith; and a finding that there was neither a prompt performance nor diligent action on the part of the company with respect to the filing was error; as was also a refusal to find that whether the report was filed within a reasonable time after the expiration of the twenty days depended upon the circumstances of the case. *Butler v. Smalley.* 71

5. The Code of Civil Procedure (§§ 870, 876) authorizes the granting of an order, before an action has actually commenced in a court of record, for the examination of a person against whom such an action is "about to be brought," upon the application of the person who is about to bring the action. *Mer. Nat. Bk. v. Sheehan.* 176
6. The granting of such an order is within the discretion of the court, and *it seems* the cases are rare where justice will be promoted by granting it. *Id.*
7. Where an administrator of the estate of a deceased lunatic commenced proceedings by petition in the Court of Common Pleas of the city of New York, to compel the committee of the lunatic to account and to deliver over the property remaining, and thereafter entered an *ex parte* order of discontinuance, the costs to be paid by the administrator, which order, after tender of costs, was vacated by the court, and thereupon the administrator moved for leave to discontinue, which was

denied, the only facts shown being that after the entry of the first order the administrator had commenced an action in the Supreme Court to settle the accounts. *Held*, that there was no just basis for the refusal of leave upon which any discretion was called into exercise or could operate; and that the denial of the motion was error. *In re Butler.* 307

— *Sufficiency of affidavits to give jurisdiction and to sustain order for service of summons by publication.*

See Kennedy v. N. Y. L. Ins. & T. Co. 487

— *For purposes of appeal a judgment in proceedings by certiorari to review assessment under chapter 269, Laws of 1880, is to be considered as an order.*

See People, ex rel. v. Keator. 610

MUNICIPAL CORPORATIONS.

1. A municipal corporation has no right, in the exercise of its power to determine when, where and how to make improvements, to do so upon a plan which substantially involves the appropriation by it of the property of a citizen to a public use without making compensation therefor. *Seifert v. City of Brooklyn.* 136
2. Where exercise of a judicial or discretionary power by a municipal corporation results in a direct and physical injury to the property of an individual, which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan and the adoption of prudential measures, the corporation is liable for such damages as occur in consequence of its continuance of the original cause, after notice and an omission to adopt measures to remedy the evil. *Id.*
3. *It seems* that immunity from liability for the consequences following the exercise of judicial or discretionary power by a municipal corporation presupposes that the

act performed may in some manner be lawfully authorized. Where the act is of such nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is insufficient as a protection.

Id.

4. The rule that a municipal corporation acting under the authority of a statute cannot be subjected to a liability for damages arising from the exercise by it of the authority so conferred, is confined to such consequences as are the necessary and usual result of the proper exercise of the authority. It does not shield the corporation where injury results solely from the defective manner in which the authority was originally exercised and from continuance in wrong after notice of the injury. *Id.*

5. *It seems*, where no trust is imposed upon real estate which a municipal corporation holds in fee, it may sell and convey without legislative authority. *Kings Co. F. Ins. Co. v. Stevens.* 411

6. When authorized by the legislature, the corporation may close a portion of a street, of which it owns the fee, without compensation to owners of lots on the street which do not front upon the portion closed, at least where there is other access to the lots of such owners. *Id.*

7. The provision of the Code of Civil Procedure (§ 1778), providing that in an action against a foreign or domestic corporation upon "a promissory note or other evidence of debt, for the absolute payment of money," the plaintiff may take judgment as in case of default, unless defendant serves with its answer or demurrer a copy of an order directing the issue to be tried, etc., applies to a municipal corporation; and this, although by its charter it is authorized to sue and be sued, to complain and defend. Such a provision in its charter confers no special right not common to corporations in general. *Moran v. L. I. City.* 439

8. Said provision is constitutional. *Id.*

9. *It seems* that the decision of a judge, refusing to the corporation an order for the trial of the issues presented by the answer in such an action, is reviewable on appeal. *Id.*

See BROOKLYN (CITY OF).
CLINTON (VILLAGE OF).
KINGSTON (CITY OF).
NEW YORK (CITY OF).
PORT CHESTER (VILLAGE OF).
TROY (CITY OF).

NATIONAL BANKS.

1. A receiver of an insolvent national bank acquires no right to property in the custody of the bank, which it does not own, as against the owner; and the provision of the United States Revised Statutes (§ 5242), prohibiting the issuing of an attachment, injunction or execution against such a corporation before final judgment, was not intended to protect the receiver's custody as against such owner. *Corn Ex. Bk. v. Blye.* 303
2. Accordingly *held*, that said provision did not prohibit the issuing, in an action against the receiver of a national bank to recover possession of personal property, of a requisition directing the sheriff to take into his possession the property in question; that the receiver, if he desired to retain possession of the property during the litigation, could only do so by giving the security required, the same as other defendants in such an action. *Id.*

NEGLIGENCE.

1. One doing business on a street in a populous city has the right to temporarily obstruct the sidewalk in front of his place of business, for the purpose of loading merchandise; the right, however, is to be exercised in a reasonable manner so as not unnecessarily to in-

- cumber the sidewalk. When thus reasonably exercising such right, the occupant of the premises is not required to furnish to those passing upon the sidewalk a safe passage around the obstruction. *Welsh v. Wilson.* 254
2. Defendant, for the purpose of removing certain cases of merchandise from his store in the city of New York, placed a pair of skids from a truck across the sidewalk to the steps of the store. After they had been there about three minutes plaintiff came along the sidewalk and, seeing the skids, attempted to pass around them by the steps, and in so doing slipped upon the steps and was injured. In an action to recover damages, *held*, that defendant owed no duty to the plaintiff to see that the steps were in an absolutely safe condition for travel, and that she was not entitled to recover. *Id.*
 3. In order to establish the liability of one person for an injury caused by the negligence of another, it is not enough to show that the latter was at the time acting under an employment by the former. It must be shown in addition that the employment created the relation of master and servant. *Hexamer v. Webb.* 877
 4. Defendant employed one B., who was engaged in "the roofing and cornice business," to make some repairs to the cornice of his hotel, in the city of New York. The defect was pointed out, but no price or plan for doing the work was specified; the method of repair and the means to be employed being left entirely to the judgment of B., who agreed simply to remedy the defect. In doing the work the employes of B. suspended a ladder from the roof of the hotel, upon which planks were placed to serve as a scaffold. A gust of wind caused one of these planks to fall; it struck and injured plaintiff, who was passing at the time. Defendant was not in the city while the repairs were in progress and had no knowledge of the manner in which the work was being done. In an action to recover damages for alleged negligence causing the injury, *held*, that the complaint was properly dismissed; that the relation of master and servant did not exist between the defendant and B., but the latter was an independent contractor, and the men employed were his, not defendant's servants; also, that it was immaterial that the work was charged for by the day. *Id.*
 5. It appeared that the hotel was separated from the sidewalk by an area fifteen feet wide. *Held*, that the scaffold thus suspended was not a nuisance, nor was it violative of a city ordinance prohibiting the hanging of any goods or other things in front of a building at a greater distance than one foot. *Id.*
 6. *It seems* the ordinance does not apply to a temporary structure erected for the purpose of repairing a building. *Id.*
 7. A person who goes upon the land of another, without invitation, to secure employment from the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey. Although it may be shown that the owner might have ascertained the defect by the exercise of reasonable care, he owes no legal duty to a stranger so coming upon his premises, which requires him to keep the machinery in repair. *Larmore v. C. P. Iron Co.* 391
 8. The case distinguished from one where the person injured is an employe of the owner, or where the injury is caused by some dangerous thing placed by the owner upon the premises, without giving warning thereof, or where the owner, in the prosecution of his own purpose or business, invites another, either expressly or impliedly, to come upon his land, who is injured by unreasonable or concealed dangers, or where a licen-

see is injured by some affirmative negligence. *Id.*

9. *It seems* that where a servant, employed in the performance of ordinary labor, in which no machinery is used or materials furnished requiring great skill and care, is injured by a defective instrument or tool furnished by the master, of the defects in which the servant has full knowledge and comprehension, he cannot hold the master responsible. *Marsh v. Chickering.* 396

10. Plaintiff, a servant in the defendants' employ, was injured by the slipping of a ladder which he was using in lighting lamps in front of defendants' building. The ladder was a new one which, by defendants' permission, plaintiff himself had ordered made, and which he had used in safety for over six weeks. After the ladder was delivered he told defendants' superintendent that it ought to be hooked and spiked, or there would be an accident. The superintendent promised to have this done. This promise was repeated several times, but was not performed. The accident occurred upon a stormy night, sleet, snow and rain falling, and the wind blowing. Plaintiff had lighted safely seven lamps, changing the position of the ladder each time; when lighting the eighth the ladder slipped. In an action to recover damages, *held*, that these facts did not justify a recovery, as it failed to prove that defendants had not furnished a proper ladder. *Id.*

11. A master does not owe to his servant the duty of furnishing the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable. *Id.*

12. In an action against a railroad company to recover for injuries sustained at a crossing, where the negligence alleged was the failure to ring a bell or blow a whistle as the train approached the crossing, testimony of passengers on the train, who were in a position to

have heard, that they did not hear either of these signals, is competent, although it does not affirmatively appear that they were looking, watching or listening therefor. *Greany v. L. I. R. R. Co.* 419

13. Where in such an action there is any evidence, direct or inferential, of care or caution on the part of the person injured, the question as to contributory negligence is for the jury. *Id.*

14. While a person approaching a crossing is bound to make all reasonable efforts to see, that a careful, prudent man would make in like circumstances, his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal. *Id.*

15. In such an action plaintiff's testimony was to the effect that she lived north of defendant's road; she was going south from her home upon a highway which crossed the tracks of said road at a station located south of the tracks. As she approached the crossing, a train going east on the south track stopped at the station; its cars reached across the highway, leaving no room to pass. She stopped for awhile, and then proceeded; she stopped again as she reached the north track; just then the train started up. She testified that as she came up to the track, she looked both ways "along the track, and saw no engine," except that of the train at the station. She took a step or two to cross, and as she did so, saw a train coming from the east on the north track, but so close that she could not escape, and she was struck by it and injured. This occurred in what seemed to the witness not more than a few seconds after she had looked up and down the track. The trains did not usually meet at the station, but the one going east was behind time. On cross-examination the plaintiff testified that if she had looked earlier, she might have seen the train, but did not think there

was any need of looking more than once, and did not think there was any other train due at that time; that she had looked a few seconds before, and then went on. The engine at the station was blowing off steam, and she did not hear any bell or whistle from the approaching train. This there was testimony tending to show was running at a dangerous rate of speed. *Held*, that the question of contributory negligence was properly submitted to the jury. *Id.*

16. A servant accepts the service, subject to the risks incident to it, and where, when he enters into the employment, the machinery and implements used in the master's business are of a certain kind or condition, and the servant knows it, he voluntarily takes the risk resulting from their use, and can make no claim upon the master to furnish other or different safeguards. *Sweeney v. B. & J. E. Co.* 520

17. A master may carry on his business with an old machine not provided with all the safeguards attached to newer machines; he may discharge a servant employed to run it who refuses to perform his stipulated service, and a threat to do so is not coercion, which will make the master liable for injuries to the servant resulting from the use of the machine. *Id.*

18. A master may not exempt himself from liability for an omission of the duty resting upon him to furnish, for the use of his servants, safe, sound and suitable tools, implements, appliances and machinery, by delegating its performance to another; the latter stands in the place of the master in discharging the duty, and for his neglect therein the master is responsible. *Benzing v. Steinway & Sons.* 547

19. Plaintiff, an employe in defendant's factory, was called from his work to assist in putting up girders to support a roof in another part of the factory. This was not in the line of his general employment, and he had no previous knowledge

of the appliances used in the prosecution of the work. He was ordered by the foreman to get upon the platform; he asked the foreman if it was safe, and was assured by him that it was. Plaintiff went upon the platform; one of the boards composing it, which was defective, broke, and he fell and was injured; he had no opportunity to examine the platform, and the evidence left it in doubt whether, upon examination, the defect could have been discovered. In an action to recover damages for the injury, the complaint was dismissed on the ground that the neglect, if any, was that of a co-servant, for which the master was not liable. *Held* error. *Id.*

20. *It seems* that where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause; if under the testimony it is just as probable that it was caused by the one as the other, he cannot recover. *Searles v. Manhattan R. Co.* 661

21. A failure upon the part of a county treasurer to collect a bond and mortgage in his hands as such, is not alone sufficient to create a liability against him, facts must be shown establishing a neglect of duty on his part. *Woolley v. Baldwin.* 688

—Master not liable to servant for negligence of co-servant. *Neubauer v. N. Y., L. E. & W. R. R. Co. (Mem.)* 607

—Where questions as to negligence and contributory negligence are of fact for jury. *Allison v. Village of M. (Mem.)* 667

NEW YORK (CITY OF).

1. The act of 1866 (Chap. 367, Laws

- of 1866), entitled "An act relative to the powers and duties of the commissioners of Central Park," is not violative of the constitutional requirement (State Const., art. 3, § 16), that a local or private bill shall embrace but one subject, which shall be expressed in the title. *In re Knaust*. 188
2. The said act was not superseded by the act chapter 697 of the Laws of 1867 (amended by chap. 288, Laws of 1868). *Id.*
 3. The power conferred upon the commissioners of Central Park by said act of 1866, in respect to the improvement directed, and subsequently transferred to the department of public works (Chap. 383, Laws of 1870; chap. 872, Laws of 1872), is exclusive of that conferred upon any other body; and the manner of doing the work is left to their discretion. *Id.*
 4. Accordingly *held*, it was no objection to an assessment for the improvement that there was no ordinance of the common council authorizing it, or that the work was not done by contract let to the lowest bidder. *Id.*
 5. Errors and irregularities in assessments for street openings in the city of New York must be corrected and reviewed in the proceedings themselves; they cannot be reached by a collateral action in equity. An order confirming the assessment has the force and conclusiveness of a judgment. *Mayer v. Mayor, etc.* 284
 6. The provision of the Consolidation Act (§ 897, chap. 410, Laws of 1832), declaring that no suit in equity or otherwise "shall be commenced for the vacation of any assessment in said city," is not limited to any particular class, but applies to every assessment. *Id.*
 7. The expenses of opening a street were assessed partly upon the property benefited and partly upon the city at large. After the confirmation of the report of the commissioners, in which was included an item for their fees and expenses, the city resisted that claim and succeeded in effecting a settlement by which the item was largely reduced. *Held*, that an owner of property assessed was entitled to maintain an action in equity to compel the application upon his assessment of a *pro rata* share of the amount saved; but that he was liable to interest from the date of the assessment; this being in no manner affected as a complete and binding adjudication by the allowance, which was simply in the nature of a credit to be applied on a conceded debt. *Id.*
 8. Plaintiff was duly appointed police commissioner of the city of New York; he duly qualified and entered upon the performance of the duties of the office. Subsequently he was unlawfully removed by the mayor, and defendant appointed for the unexpired term. The latter, on presentation of his certificate of appointment, was recognized by the board of police commissioners, and assumed the duties of the office against the protests of plaintiff, who claimed the appointment was unauthorized. The proceedings of the mayor in removing plaintiff were reversed and annulled on *certiorari*, and thereupon he was again officially recognized by the board, and resumed the duties of his office; during the time of his exclusion he was ready and willing to perform such duties. Defendant drew the salary of the office during the time he performed its duties. *Held*, that an action to recover the amount so received was maintainable; and that the record in the *certiorari* proceedings was properly admitted in evidence against the defendant on the trial of the action. *Nichols v. MacLean*. 526
- *City ordinance, prohibiting the having of goods or other articles in front of a building at a greater distance than one foot therefrom, does not apply to a scaffolding or temporary structure erected for purpose of repairing building.*
See Hexamer v. Webb. 877

NOTICE.

Where upon a copy of a judgment served was indorsed the name of the attorney with his post-office and business address, and below was indorsed a notice of judgment signed by the attorney without giving any address, *held*, that this was a sufficient compliance with the rule of practice (Rule 2), requiring papers served to be indorsed or subscribed by the attorney, with his address, etc. *People, ex rel. W. V. R. R. Co., v. Keator.* 610

— *Failure to give notice immaterial, where party has knowledge.*

See N. C. Bank v. N. Y. G. E. Bank. 595

NOTICE AND PROOF OF.

— *Where notice of application to appoint commissioners in proceedings for local improvements is given for a day which is a public holiday the appointment of commissioners the next day, at most a mere irregularity, the order not void.*

See In re Opening, etc., Flushing Ave. (Mem.) 678

NUISANCE.

1. To authorize the construction of a railroad upon or over a highway, where individuals own private rights or interests therein, or in the soil thereof, not only must the public right or license be obtained, but the individual rights and interests must be lawfully acquired; and if constructed without such acquisition, the builders are trespassers and are liable for all the damages sustained by the owners of such rights and property as to whom the railroad is a continuing nuisance. *Uline v. N. Y. C. & H. R. R. Co.* 98

2. Where, however, the railroad is built, with proper care and skill, after the public rights and the private property, if any, in the highway or the soil thereof, have been acquired, it is not a nuisance, and the owners of the rail-

road are not responsible for any damages to private property, adjacent or near to the road, necessarily resulting from its construction or operation. *Id.*

3. Where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action; and it seems for any damages thereafter sustained, other actions may be brought successively until the nuisance shall be abated. The structure being a nuisance the railroad company is under legal obligation to remove it, and it is not to be presumed that it will continue it permanently. Damages, therefore, may not be awarded upon that assumption, nor will the judgment operate as a purchase of the right to have the structure remain. *Id.*

4. *It seems* that where a railroad is unlawfully constructed in a street the adjacent owner has these remedies: he may bring successive suits to recover his damages; he may bring an action in equity to restrain the operation of the road and compel the abatement of the nuisance, or when the highway has been exclusively appropriated, he may maintain an action of ejectment. *Id.*

5. Commissioners of sewage and assessment of the city of Brooklyn, in pursuance of the authority given them by statute (Chap. 521, Laws of 1857; chap. 136, Laws of 1861), established a drainage district, not theretofore drained over the lands of plaintiff, and a plan of drainage which contemplated the construction of a main sewer into which lateral sewers to be constructed from time to time should empty. The main sewer was built in 1868, and subsequently various lateral sewers. Soon after the completion of the main sewer, actual use demonstrated that it was insufficient to carry off the sewage turned into it, and at times this was forced through the man-holes

- and inundated plaintiff's premises, inflicting serious injury. These inundations increased in frequency as new lateral sewers were connected with the main trunk, and became well known to the municipal officers. Notwithstanding this the city continued to build and attach lateral sewers, increasing from year to year the evil produced by the defects in the original plan. In an action to recover damages, *held*, that the city was liable; that having by the exercise of its power created a private nuisance on plaintiff's premises, it incurred a duty of adopting such measures as should abate the nuisance, and having the power to perform it, its omission to do so renders it liable. *Seifert v. City of B'klyn.* 130
6. The defendants who appeal were owners of certain premises in the city of New York which they leased to M., who, under and in accordance with a permit from the city, built vaults under the sidewalk in front thereof, with a coal-hole which was properly constructed, and in the usual and permitted manner. Through the wrongful act of a stranger, who broke the stone supporting the iron cover of the coal-hole, the cover turned when plaintiff stepped upon it and he fell and was injured. In an action to recover damages, it did not appear that the appellants had any knowledge or notice of the defect. *Held*, that they were not liable, and *it seems* they would not have been liable had they themselves constructed the vaults lawfully and with due prudence and care, and thereafter transferred possession of the premises to a third person without covenant on their part to repair; that if the coal-hole became a nuisance after the stone was broken only the person who created the nuisance, or he who suffered it to continue, was responsible, and that a party out of possession and control and who had no knowledge, actual or constructive, of the defect could not be said to have suffered it to continue. *Wolf v. Kilpatrick.* 146
7. A landlord out of possession is not responsible for an after-occurring nuisance unless in some manner he is in fault for its creation or continuance; the bare ownership will not produce this result. *Id.*
8. One doing business on a street in a populous city has the right to temporarily obstruct the sidewalk in front of his place of business, for the purpose of loading merchandise; the right, however, is to be exercised in a reasonable manner so as not unnecessarily to incumber the sidewalk; when thus reasonably exercising such right, the occupant of the premises is not required to furnish to those passing upon the sidewalk a safe passage around the obstruction. *Welsh v. Wilson.* 254
9. Defendant employed one B., who was engaged in "the roofing and cornice business," to make some repairs to the cornice of his hotel, in the city of New York. The defect was pointed out, but no price or plan for doing the work was specified; the method of repair and the means to be employed being left entirely to the judgment of B., who agreed simply to remedy the defect. In doing the work the employes of B. suspended a ladder from the roof of the hotel, upon which planks were placed to serve as a scaffold. A gust of wind caused one of these planks to fall, it struck and injured plaintiff, who was passing at the time. Defendant was not in the city while the repairs were in progress, and had no knowledge of the manner in which the work was being done. In an action to recover damages for alleged negligence causing the injury, it appeared that the hotel was separated from the sidewalk by an area fifteen feet wide. *Held*, that the scaffold thus suspended was not a nuisance. *Hexamer v. Webb.* 377

OCEAN.

See SEA

OFFICE AND OFFICER

1. While the legislature may abolish an office, diminish the salary or change the mode of compensation during the term of an incumbent, subject only to constitutional restrictions, yet within these limits the right to an office carries with it the right to the emoluments, and an officer unlawfully dispossessed of his office may, upon his reinstatement therein, maintain an action against an intruder, to recover the damages resulting from the intrusion; as a general rule, the salary or fees of the office received by the intruder are the measure of damages. *Nichols v. MacLean*. 526
2. Plaintiff was duly appointed police commissioner of the city of New York; he duly qualified and entered upon the performance of the duties of the office. Subsequently he was unlawfully removed by the mayor, and defendant appointed for the unexpired term. The latter, on presentation of his certificate of appointment, was recognized by the board of police commissioners, and assumed the duties of the office against the protests of plaintiff, who claimed the appointment was unauthorized. The proceedings of the mayor in removing plaintiff were reversed and annulled on *certiorari*, and thereupon he was again officially recognized by the board, and resumed the duties of his office, during the time of his exclusion he was ready and willing to perform such duties. Defendant drew the salary of the office during the time he performed its duties. *Held*, that an action to recover the amount so received was maintainable; and that the record in the *certiorari* proceedings was properly admitted in evidence against the defendant on the trial of the action. *Id.*
3. As to whether in such case the record, in the absence of collusion or fraud, is conclusive, *quare*. *Id.*
4. The distinction between this case and one where the officer *de jure* has not been reinstated pointed out. *Id.*
5. *It seems* in the latter case the remedy of the officer is by action in the nature of a *quo warranto*; but such an action will not lie when the intruder has voluntarily surrendered the office. *Id.*
6. An illegal exercise of the power of appointment to fill an assumed vacancy confers no additional protection upon the appointee because coupled with the fact of a prior summary removal of the rightful incumbent by the officer who made the appointment, in the exercise of a *quasi* judicial discretion. *Id.*
7. The doctrine which protects rights acquired on the faith of a judgment, notwithstanding its subsequent reversal, is not applicable to such a case. *Id.*
8. In an action under the Code of Civil Procedure, in the nature of a *quo warranto* (§§ 1933, 1948), in which the person alleged to be rightfully entitled to the office was joined with the people as relator, after final judgment against defendant and in favor of the claimant, the court, in June, 1883, upon motion allowed a supplemental complaint claiming damages in consequence of defendant's intrusion into the office, with leave to answer, and directing the action to stand over until a day named. *Held* no error; that under the provision of said Code (§ 1953, prior to its amendment by chap. 399, Laws of 1884), as it then stood, which authorized a recovery "in the same action against the defendant," of the damages sustained by the person entitled to the office, and under the provision of the Code allowing supplemental pleadings (§ 544), the order was justified. *People, ex rel. Swinburne, v. Nolan*. 539
9. The relator in such an action is entitled to recover as damages the salary or emoluments received by defendant while he unlawfully held the office. *Id.*
10. As to whether, under any circumstances, these damages may be diminished, *quare*. *Id.*

11. Taking the oath and a demand of possession of the office are not conditions precedent to the relator's right of recovery; it is not part of the plaintiffs' case to show that the relator was prepared to enter upon the duties of the office, nor is it any defense that conditions precedent to their performance have not been observed by him. *Id.*

ORDERS.

See MOTIONS AND ORDERS.

PARTIES.

1. The Code of Civil Procedure (§§ 870, 876) authorizes the granting of an order, before an action has actually commenced in a court of record, for the examination of a person against whom such an action is "about to be brought," upon the application of the person who is about to bring the action. *Mer. Nat. Bk. v. Sheehan.* 178
2. The granting of such an order is within the discretion of the court, and it seems the cases are rare where justice will be promoted by granting it. *Id.*
8. While judgment creditors, holding distinct and several judgments, may unite in an action to set aside a conveyance of land by the common debtor, made in fraud of their rights as creditors, they are not all necessary parties to such an action, and where one of them has commenced such an action, the Code of Civil Procedure (§ 452) does not require the court to compel the plaintiffs to bring in the other judgment creditors. *White's Bk. of Buffalo v. Parthing.* 844
4. An order, therefore, denying a motion of other judgment creditors to be allowed to intervene in such an action is discretionary, and is not reviewable here. *Id.*
5. In such an action plaintiff also sought to charge certain other lands with the lien of its judgment, on the ground that the defendant was entitled to it as devisee of G., who had caused it to be conveyed to K. as security for a debt which had since been paid. *Held*, that this did not entitle the senior judgment creditors to intervene, as a judgment in accordance with the relief demanded would not prejudice any right which they might have to enforce their judgments against the lands. *Id.*

PARTNERSHIP.

1. Where a member of a firm, who had charge of its financial business, took up firm notes by giving in exchange therefor notes of a third person, indorsed by him in the firm name, which indorsement was without the knowledge of his partner,—*Held*, that the indorsement was within the authority of the partner making it; and that the firm was liable thereon. *Steuben Co. Bk. v. Alberger.* 203
2. One of two partners on retiring from the business transferred to his copartner his interest in the firm property, each agreeing to pay one-half of its debts. The firm was solvent, but the remaining partner was in fact insolvent at the time. This, however, was not known to him or the retiring partner, and the transfer was made in good faith. In an action wherein creditors of the firm claimed a preference over the individual creditors of the remaining partner, *held*, that by the transfer the title vested in the remaining partner as his own private estate; that he acquired the same dominion over it as if it had always been his own separate property free from any lien or equity on the part of partnership creditors, and that transfers by him of the property in payment of individual debts were lawful. *Stanton v. Westover.* 285
3. In an action to recover damages for breach of a contract to form and continue a partnership for a specified term, the opinion of the witnesses as to the value of the contract to plaintiff, or as to what

would have been his share of the profits had the contract been carried out, is incompetent and its reception error. *Reed v. McConnell.* 270

—*Assets of an insolvent firm may not be reached and applied to payment of individual debt of one of the co-partners. F. E. Co. v. Lewis. (Mem.)* 674

PAYMENT.

1. Where an assessment for a local improvement is valid upon its face, but is in fact void because the assessors had no jurisdiction to impose it, an action may be maintained to recover back money involuntarily paid in satisfaction thereof without first having the assessment set aside or vacated. *Bruecher v. Village of Port Chester.* 240
2. Payment to an officer who has a valid warrant for the collection of such an assessment and who threatens to execute the same is not a voluntary payment. *Id.*
3. No demand for a return of the money so paid is necessary before the commencement of an action to recover the same. *Id.*

PENAL CODE.

- § 291. *People, ex rel. v. N. Y. C. Protective.* 195
 § 438. *Materns v. Horwitz* 469

PHYSICIAN AND SURGEON.

1. The provision of the Code of Civil Procedure (§ 834), prohibiting physicians and surgeons from disclosing information acquired in attending a patient, is applicable to criminal actions. (Code of Crim. Pro., § 392.) *People v. Murphy.* 126
2. Where, upon the trial of an indictment for abortion, a physician, who, after the commission of the alleged crime, attended upon the female upon whose person it was

alleged to have been committed, was allowed to give, as a witness for the prosecution, his opinion as a medical expert, that the crime had been committed, founded upon what he observed as to the physical condition of the woman and upon her narrative of the facts, and it appeared that she was alive at the time of the trial. *Held* error. *Id.*

3. Also *held*, the fact that the physician was selected and sent by the public prosecutor to attend upon the female did not affect the question; that as she accepted his services in his professional character the relation of physician and patient was established between them. *Id.*
4. Also *held*, that although she was a party to the crime, her declarations, which were simply a narrative of a past transaction and constituting no part of the *res gesta*, were not admissible. *Id.*

PIERS.

See WHARVES.

PLEADING.

1. It is essential to the legal statement in a complaint of a cause of action *ex contractu*, that it should allege an existing contract and the performance by plaintiff of such conditions precedent as are thereby provided, or a tender of performance or some adequate excuse for non-performance. *Bogardus v. N. Y. L. Ins. Co.* 828
2. Such an excuse exists only when the defendant has prevented performance by plaintiff, or has himself wholly refused to perform, or has wholly disabled himself from completing a substantial performance. *Id.*
3. The failure of the defendant to perform some of the obligations of the contract which go to a part only of the consideration, when the breach may be paid for in damages, is not sufficient. *Id.*

act performed may in some manner be lawfully authorized. Where the act is of such nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is insufficient as a protection.

Id.

4. The rule that a municipal corporation acting under the authority of a statute cannot be subjected to a liability for damages arising from the exercise by it of the authority so conferred, is confined to such consequences as are the necessary and usual result of the proper exercise of the authority. It does not shield the corporation where injury results solely from the defective manner in which the authority was originally exercised and from continuance in wrong after notice of the injury. *Id.*

5. *It seems*, where no trust is imposed upon real estate which a municipal corporation holds in fee, it may sell and convey without legislative authority. *Kings Co. F. Ins. Co. v. Stevens.* 411

6. When authorized by the legislature, the corporation may close a portion of a street, of which it owns the fee, without compensation to owners of lots on the street which do not front upon the portion closed, at least where there is other access to the lots of such owners. *Id.*

7. The provision of the Code of Civil Procedure (§ 1778), providing that in an action against a foreign or domestic corporation upon "a promissory note or other evidence of debt, for the absolute payment of money," the plaintiff may take judgment as in case of default, unless defendant serves with its answer or demurrer a copy of an order directing the issue to be tried, etc., applies to a municipal corporation; and this, although by its charter it is authorized to sue and be sued, to complain and defend. Such a provision in its charter confers no special right not common to corporations in general. *Moran v. L. I. City.* 439

8. Said provision is constitutional. *Id.*

9. *It seems* that the decision of a judge, refusing to the corporation an order for the trial of the issues presented by the answer in such an action, is reviewable on appeal. *Id.*

See BROOKLYN (CITY OF).
CLINTON (VILLAGE OF).
KINGSTON (CITY OF).
NEW YORK (CITY OF).
PORT CHESTER (VILLAGE OF).
TROY (CITY OF).

NATIONAL BANKS.

1. A receiver of an insolvent national bank acquires no right to property in the custody of the bank, which it does not own, as against the owner; and the provision of the United States Revised Statutes (§ 5242), prohibiting the issuing of an attachment, injunction or execution against such a corporation before final judgment, was not intended to protect the receiver's custody as against such owner. *Corn Ex. Bk. v. Blye.* 303
2. Accordingly *held*, that said provision did not prohibit the issuing, in an action against the receiver of a national bank to recover possession of personal property, of a requisition directing the sheriff to take into his possession the property in question; that the receiver, if he desired to retain possession of the property during the litigation, could only do so by giving the security required, the same as other defendants in such an action. *Id.*

NEGLIGENCE.

1. One doing business on a street in a populous city has the right to temporarily obstruct the sidewalk in front of his place of business, for the purpose of loading merchandise; the right, however, is to be exercised in a reasonable manner so as not unnecessarily to in-

cumber the sidewalk. When thus reasonably exercising such right, the occupant of the premises is not required to furnish to those passing upon the sidewalk a safe passage around the obstruction. *Welsh v. Wilson.* 254

2. Defendant, for the purpose of removing certain cases of merchandise from his store in the city of New York, placed a pair of skids from a truck across the sidewalk to the steps of the store. After they had been there about three minutes plaintiff came along the sidewalk and, seeing the skids, attempted to pass around them by the steps, and in so doing slipped upon the steps and was injured. In an action to recover damages, *held*, that defendant owed no duty to the plaintiff to see that the steps were in an absolutely safe condition for travel, and that she was not entitled to recover. *Id.*

3. In order to establish the liability of one person for an injury caused by the negligence of another, it is not enough to show that the latter was at the time acting under an employment by the former. It must be shown in addition that the employment created the relation of master and servant. *Hexter v. Webb.* 377

4. Defendant employed one B., who was engaged in "the roofing and cornice business," to make some repairs to the cornice of his hotel, in the city of New York. The defect was pointed out, but no price or plan for doing the work was specified; the method of repair and the means to be employed being left entirely to the judgment of B., who agreed simply to remedy the defect. In doing the work the employes of B. suspended a ladder from the roof of the hotel, upon which planks were placed to serve as a scaffold. A gust of wind caused one of these planks to fall; it struck and injured plaintiff, who was passing at the time. Defendant was not in the city while the repairs were in progress and had no knowledge of the man-

ner in which the work was being done. In an action to recover damages for alleged negligence causing the injury, *held*, that the complaint was properly dismissed; that the relation of master and servant did not exist between the defendant and B., but the latter was an independent contractor, and the men employed were his, not defendant's servants; also, that it was immaterial that the work was charged for by the day. *Id.*

5. It appeared that the hotel was separated from the sidewalk by an area fifteen feet wide. *Held*, that the scaffold thus suspended was not a nuisance, nor was it violative of a city ordinance prohibiting the hanging of any goods or other things in front of a building at a greater distance than one foot. *Id.*

6. *It seems* the ordinance does not apply to a temporary structure erected for the purpose of repairing a building. *Id.*

7. A person who goes upon the land of another, without invitation, to secure employment from the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey. Although it may be shown that the owner might have ascertained the defect by the exercise of reasonable care, he owes no legal duty to a stranger so coming upon his premises, which requires him to keep the machinery in repair. *Larmore v. C. P. Iron Co.* 391

8. The case distinguished from one where the person injured is an employe of the owner, or where the injury is caused by some dangerous thing placed by the owner upon the premises, without giving warning thereof, or where the owner, in the prosecution of his own purpose or business, invites another, either expressly or impliedly, to come upon his land, who is injured by unreasonable or concealed dangers, or where a licen-

see is injured by some affirmative negligence. *Id.*

9. *It seems* that where a servant, employed in the performance of ordinary labor, in which no machinery is used or materials furnished requiring great skill and care, is injured by a defective instrument or tool furnished by the master, of the defects in which the servant has full knowledge and comprehension, he cannot hold the master responsible. *Marsh v. Chickering.* 396

10. Plaintiff, a servant in the defendants' employ, was injured by the slipping of a ladder which he was using in lighting lamps in front of defendants' building. The ladder was a new one which, by defendants' permission, plaintiff himself had ordered made, and which he had used in safety for over six weeks. After the ladder was delivered he told defendants' superintendent that it ought to be hooked and spiked, or there would be an accident. The superintendent promised to have this done. This promise was repeated several times, but was not performed. The accident occurred upon a stormy night, sleet, snow and rain falling, and the wind blowing. Plaintiff had lighted safely seven lamps, changing the position of the ladder each time; when lighting the eighth the ladder slipped. In an action to recover damages, *held*, that these facts did not justify a recovery, as it failed to prove that defendants had not furnished a proper ladder. *Id.*

11. A master does not owe to his servant the duty of furnishing the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable. *Id.*

12. In an action against a railroad company to recover for injuries sustained at a crossing, where the negligence alleged was the failure to ring a bell or blow a whistle as the train approached the crossing, testimony of passengers on the train, who were in a position to

have heard, that they did not hear either of these signals, is competent, although it does not affirmatively appear that they were looking, watching or listening therefor. *Greany v. L. I. R. R. Co.* 419

13. Where in such an action there is any evidence, direct or inferential, of care or caution on the part of the person injured, the question as to contributory negligence is for the jury. *Id.*

14. While a person approaching a crossing is bound to make all reasonable efforts to see, that a careful, prudent man would make in like circumstances, his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal. *Id.*

15. In such an action plaintiff's testimony was to the effect that she lived north of defendant's road; she was going south from her home upon a highway which crossed the tracks of said road at a station located south of the tracks. As she approached the crossing, a train going east on the south track stopped at the station; its cars reached across the highway, leaving no room to pass. She stopped for awhile, and then proceeded; she stopped again as she reached the north track; just then the train started up. She testified that as she came up to the track, she looked both ways "along the track, and saw no engine," except that of the train at the station. She took a step or two to cross, and as she did so, saw a train coming from the east on the north track, but so close that she could not escape, and she was struck by it and injured. This occurred in what seemed to the witness not more than a few seconds after she had looked up and down the track. The trains did not usually meet at the station, but the one going east was behind time. On cross-examination the plaintiff testified that if she had looked earlier, she might have seen the train, but did not think there

was any need of looking more than once, and did not think there was any other train due at that time; that she had looked a few seconds before, and then went on. The engine at the station was blowing off steam, and she did not hear any bell or whistle from the approaching train. This there was testimony tending to show was running at a dangerous rate of speed. *Held*, that the question of contributory negligence was properly submitted to the jury. *Id.*

16. A servant accepts the service, subject to the risks incident to it, and where, when he enters into the employment, the machinery and implements used in the master's business are of a certain kind or condition, and the servant knows it, he voluntarily takes the risk resulting from their use, and can make no claim upon the master to furnish other or different safeguards. *Sweeney v. B. & J. E. Co.* 520

17. A master may carry on his business with an old machine not provided with all the safeguards attached to newer machines; he may discharge a servant employed to run it who refuses to perform his stipulated service, and a threat to do so is not coercion, which will make the master liable for injuries to the servant resulting from the use of the machine. *Id.*

18. A master may not exempt himself from liability for an omission of the duty resting upon him to furnish, for the use of his servants, safe, sound and suitable tools, implements, appliances and machinery, by delegating its performance to another; the latter stands in the place of the master in discharging the duty, and for his neglect therein the master is responsible. *Benzing v. Steinway & Sons.* 547

19. Plaintiff, an employe in defendant's factory, was called from his work to assist in putting up girders to support a roof in another part of the factory. This was not in the line of his general employment, and he had no previous knowledge

of the appliances used in the prosecution of the work. He was ordered by the foreman to get upon the platform; he asked the foreman if it was safe, and was assured by him that it was. Plaintiff went upon the platform; one of the boards composing it, which was defective, broke, and he fell and was injured; he had no opportunity to examine the platform, and the evidence left it in doubt whether, upon examination, the defect could have been discovered. In an action to recover damages for the injury, the complaint was dismissed on the ground that the neglect, if any, was that of a co-servant, for which the master was not liable. *Held* error. *Id.*

20. *It seems* that where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause; if under the testimony it is just as probable that it was caused by the one as the other, he cannot recover. *Searles v. Manhattan R. Co.* 661

21. A failure upon the part of a county treasurer to collect a bond and mortgage in his hands as such, is not alone sufficient to create a liability against him, facts must be shown establishing a neglect of duty on his part. *Woolley v. Baldwin.* 688

— *Master not liable to servant for negligence of co-servant.* *Neubauer v. N. Y., L. E. & W. R. R. Co. (Mem.)* 607

— *Where questions as to negligence and contributory negligence are of fact for jury.* *Allison v. Village of M. (Mem.)* 667

NEW YORK (CITY OF).

1. The act of 1866 (Chap. 367, Laws

- of 1866), entitled "An act relative to the powers and duties of the commissioners of Central Park," is not violative of the constitutional requirement (State Const., art. 3, § 16), that a local or private bill shall embrace but one subject, which shall be expressed in the title. *In re Knaust.* 188
2. The said act was not superseded by the act chapter 697 of the Laws of 1867 (amended by chap. 288, Laws of 1868). *Id.*
 3. The power conferred upon the commissioners of Central Park by said act of 1866, in respect to the improvement directed, and subsequently transferred to the department of public works (Chap. 383, Laws of 1870; chap. 872, Laws of 1872), is exclusive of that conferred upon any other body; and the manner of doing the work is left to their discretion. *Id.*
 4. Accordingly *held*, it was no objection to an assessment for the improvement that there was no ordinance of the common council authorizing it, or that the work was not done by contract let to the lowest bidder. *Id.*
 5. Errors and irregularities in assessments for street openings in the city of New York must be corrected and reviewed in the proceedings themselves; they cannot be reached by a collateral action in equity. An order confirming the assessment has the force and conclusiveness of a judgment. *Mayer v. Mayor, etc.* 284
 6. The provision of the Consolidation Act (§ 897, chap. 410, Laws of 1832), declaring that no suit in equity or otherwise "shall be commenced for the vacation of any assessment in said city," is not limited to any particular class, but applies to every assessment. *Id.*
 7. The expenses of opening a street were assessed partly upon the property benefited and partly upon the city at large. After the confirmation of the report of the commissioners, in which was included an item for their fees and expenses, the city resisted that claim and succeeded in effecting a settlement by which the item was largely reduced. *Held*, that an owner of property assessed was entitled to maintain an action in equity to compel the application upon his assessment of a *pro rata* share of the amount saved; but that he was liable to interest from the date of the assessment; this being in no manner affected as a complete and binding adjudication by the allowance, which was simply in the nature of a credit to be applied on a conceded debt. *Id.*
 8. Plaintiff was duly appointed police commissioner of the city of New York; he duly qualified and entered upon the performance of the duties of the office. Subsequently he was unlawfully removed by the mayor, and defendant appointed for the unexpired term. The latter, on presentation of his certificate of appointment, was recognized by the board of police commissioners, and assumed the duties of the office against the protests of plaintiff, who claimed the appointment was unauthorized. The proceedings of the mayor in removing plaintiff were reversed and annulled on *certiorari*, and thereupon he was again officially recognized by the board, and resumed the duties of his office; during the time of his exclusion he was ready and willing to perform such duties. Defendant drew the salary of the office during the time he performed its duties. *Held*, that an action to recover the amount so received was maintainable; and that the record in the *certiorari* proceedings was properly admitted in evidence against the defendant on the trial of the action. *Nichols v. MacLean.* 526
- City ordinance, prohibiting the having of goods or other articles in front of a building at a greater distance than one foot therefrom, does not apply to a scaffolding or temporary structure erected for purpose of repairing building.
See Hexamer v. Webb. 877

NOTICE.

Where upon a copy of a judgment served was indorsed the name of the attorney with his post-office and business address, and below was indorsed a notice of judgment signed by the attorney without giving any address, *held*, that this was a sufficient compliance with the rule of practice (Rule 2), requiring papers served to be indorsed or subscribed by the attorney, with his address, etc. *People, ex rel. W. V. R. R. Co., v. Keator.* 610

— *Failure to give notice immaterial, where party has knowledge.*
See N. C. Bank v. N. Y. G. E. Bank. 595

NOTICE AND PROOF OF.

— *Where notice of application to appoint commissioners in proceedings for local improvements is given for a day which is a public holiday the appointment of commissioners the next day, at most a mere irregularity, the order not void.*

See In re Opening, etc., Flushing Ave. (Mem.) 678

NUISANCE.

1. To authorize the construction of a railroad upon or over a highway, where individuals own private rights or interests therein, or in the soil thereof, not only must the public right or license be obtained, but the individual rights and interests must be lawfully acquired; and if constructed without such acquisition, the builders are trespassers and are liable for all the damages sustained by the owners of such rights and property as to whom the railroad is a continuing nuisance. *Uline v. N. Y. C. & H. R. R. Co.* 98

2. Where, however, the railroad is built, with proper care and skill, after the public rights and the private property, if any, in the highway, or the soil thereof, have been acquired, it is not a nuisance, and the owners of the rail-

road are not responsible for any damages to private property, adjacent or near to the road, necessarily resulting from its construction or operation. *Id.*

3. Where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action; and it seems for any damages thereafter sustained, other actions may be brought successively until the nuisance shall be abated. The structure being a nuisance the railroad company is under legal obligation to remove it, and it is not to be presumed that it will continue it permanently. Damages, therefore, may not be awarded upon that assumption, nor will the judgment operate as a purchase of the right to have the structure remain. *Id.*

4. *It seems* that where a railroad is unlawfully constructed in a street the adjacent owner has these remedies: he may bring successive suits to recover his damages; he may bring an action in equity to restrain the operation of the road and compel the abatement of the nuisance, or when the highway has been exclusively appropriated, he may maintain an action of ejectment. *Id.*

5. Commissioners of sewage and assessment of the city of Brooklyn, in pursuance of the authority given them by statute (Chap. 521, Laws of 1857; chap 136, Laws of 1861), established a drainage district, not theretofore drained over the lands of plaintiff, and a plan of drainage which contemplated the construction of a main sewer into which lateral sewers to be constructed from time to time should empty. The main sewer was built in 1868, and subsequently various lateral sewers. Soon after the completion of the main sewer, actual use demonstrated that it was insufficient to carry off the sewage turned into it, and at times this was forced through the man-holes

- and inundated plaintiff's premises, inflicting serious injury. These inundations increased in frequency as new lateral sewers were connected with the main trunk, and became well known to the municipal officers. Notwithstanding this the city continued to build and attach lateral sewers, increasing from year to year the evil produced by the defects in the original plan. In an action to recover damages, *held*, that the city was liable; that having by the exercise of its power created a private nuisance on plaintiff's premises, it incurred a duty of adopting such measures as should abate the nuisance, and having the power to perform it, its omission to do so renders it liable. *Seifert v. City of B'klyn.* 136
6. The defendants who appeal were owners of certain premises in the city of New York which they leased to M., who, under and in accordance with a permit from the city, built vaults under the sidewalk in front thereof, with a coal-hole which was properly constructed, and in the usual and permitted manner. Through the wrongful act of a stranger, who broke the stone supporting the iron cover of the coal-hole, the cover turned when plaintiff stepped upon it and he fell and was injured. In an action to recover damages, it did not appear that the appellants had any knowledge or notice of the defect. *Held*, that they were not liable, and *it seems* they would not have been liable had they themselves constructed the vaults lawfully and with due prudence and care, and thereafter transferred possession of the premises to a third person without covenant on their part to repair; that if the coal-hole became a nuisance after the stone was broken only the person who created the nuisance, or he who suffered it to continue, was responsible, and that a party out of possession and control and who had no knowledge, actual or constructive, of the defect could not be said to have suffered it to continue. *Wolf v. Kulpatrick.* 146
7. A landlord out of possession is not responsible for an after-occurring nuisance unless in some manner he is in fault for its creation or continuance; the bare ownership will not produce this result. *Id.*
8. One doing business on a street in a populous city has the right to temporarily obstruct the sidewalk in front of his place of business, for the purpose of loading merchandise; the right, however, is to be exercised in a reasonable manner so as not unnecessarily to incumber the sidewalk; when thus reasonably exercising such right, the occupant of the premises is not required to furnish to those passing upon the sidewalk a safe passage around the obstruction. *Welsh v. Wilson.* 254
9. Defendant employed one B., who was engaged in "the roofing and cornice business," to make some repairs to the cornice of his hotel, in the city of New York. The defect was pointed out, but no price or plan for doing the work was specified; the method of repair and the means to be employed being left entirely to the judgment of B., who agreed simply to remedy the defect. In doing the work the employes of B. suspended a ladder from the roof of the hotel, upon which planks were placed to serve as a scaffold. A gust of wind caused one of these planks to fall, it struck and injured plaintiff, who was passing at the time. Defendant was not in the city while the repairs were in progress, and had no knowledge of the manner in which the work was being done. In an action to recover damages for alleged negligence causing the injury, it appeared that the hotel was separated from the sidewalk by an area fifteen feet wide. *Held*, that the scaffold thus suspended was not a nuisance. *Hexamer v. Webb.* 377

OCEAN.

See SEA

OFFICE AND OFFICER

1. While the legislature may abolish an office, diminish the salary or change the mode of compensation during the term of an incumbent, subject only to constitutional restrictions, yet within these limits the right to an office carries with it the right to the emoluments, and an officer unlawfully dispossessed of his office may, upon his reinstatement therein, maintain an action against an intruder, to recover the damages resulting from the intrusion; as a general rule, the salary or fees of the office received by the intruder are the measure of damages. *Nichols v. MacLean*. 536
2. Plaintiff was duly appointed police commissioner of the city of New York; he duly qualified and entered upon the performance of the duties of the office. Subsequently he was unlawfully removed by the mayor, and defendant appointed for the unexpired term. The latter, on presentation of his certificate of appointment, was recognized by the board of police commissioners, and assumed the duties of the office against the protests of plaintiff, who claimed the appointment was unauthorized. The proceedings of the mayor in removing plaintiff were reversed and annulled on *certiorari*, and thereupon he was again officially recognized by the board, and resumed the duties of his office, during the time of his exclusion he was ready and willing to perform such duties. Defendant drew the salary of the office during the time he performed its duties. *Held*, that an action to recover the amount so received was maintainable; and that the record in the *certiorari* proceedings was properly admitted in evidence against the defendant on the trial of the action. *Id.*
3. As to whether in such case the record, in the absence of collusion or fraud, is conclusive, *quære*. *Id.*
4. The distinction between this case and one where the officer *de jure* has not been reinstated pointed out. *Id.*
5. *It seems* in the latter case the remedy of the officer is by action in the nature of a *quo warranto*; but such an action will not lie when the intruder has voluntarily surrendered the office. *Id.*
6. An illegal exercise of the power of appointment to fill an assumed vacancy confers no additional protection upon the appointee because coupled with the fact of a prior summary removal of the rightful incumbent by the officer who made the appointment, in the exercise of a *quasi* judicial discretion. *Id.*
7. The doctrine which protects rights acquired on the faith of a judgment, notwithstanding its subsequent reversal, is not applicable to such a case. *Id.*
8. In an action under the Code of Civil Procedure, in the nature of a *quo warranto* (§§ 1933, 1948), in which the person alleged to be rightfully entitled to the office was joined with the people as relator, after final judgment against defendant and in favor of the claimant, the court, in June, 1883, upon motion allowed a supplemental complaint claiming damages in consequence of defendant's intrusion into the office, with leave to answer, and directing the action to stand over until a day named. *Held* no error; that under the provision of said Code (§ 1953, prior to its amendment by chap. 399, Laws of 1884), as it then stood, which authorized a recovery "in the same action against the defendant," of the damages sustained by the person entitled to the office, and under the provision of the Code allowing supplemental pleadings (§ 544), the order was justified. *People, ex rel. Swinburns, v. Nolan*. 539
9. The relator in such an action is entitled to recover as damages the salary or emoluments received by defendant while he unlawfully held the office. *Id.*
10. As to whether, under any circumstances, these damages may be diminished, *quære*. *Id.*

11. Taking the oath and a demand of possession of the office are not conditions precedent to the relator's right of recovery; it is not part of the plaintiffs' case to show that the relator was prepared to enter upon the duties of the office, nor is it any defense that conditions precedent to their performance have not been observed by him. *Id.*

ORDERS.

See MOTIONS AND ORDERS.

PARTIES.

1. The Code of Civil Procedure (§§ 870, 876) authorizes the granting of an order, before an action has actually commenced in a court of record, for the examination of a person against whom such an action is "about to be brought," upon the application of the person who is about to bring the action. *Mer. Nat. Bk. v. Sheehan.* 176
2. The granting of such an order is within the discretion of the court, and it seems the cases are rare where justice will be promoted by granting it. *Id.*
3. While judgment creditors, holding distinct and several judgments, may unite in an action to set aside a conveyance of land by the common debtor, made in fraud of their rights as creditors, they are not all necessary parties to such an action, and where one of them has commenced such an action, the Code of Civil Procedure (§ 452) does not require the court to compel the plaintiffs to bring in the other judgment creditors. *White's Bk. of Buffalo v. Furthing.* 844
4. An order, therefore, denying a motion of other judgment creditors to be allowed to intervene in such an action is discretionary, and is not reviewable here. *Id.*
5. In such an action plaintiff also sought to charge certain other lands with the lien of its judgment, on the ground that the defendant was entitled to it as devisee of G., who had caused it to be conveyed to K. as security for a debt which had since been paid. *Held*, that this did not entitle the senior judgment creditors to intervene, as a judgment in accordance with the relief demanded would not prejudice any right which they might have to enforce their judgments against the lands. *Id.*

PARTNERSHIP.

1. Where a member of a firm, who had charge of its financial business, took up firm notes by giving in exchange therefor notes of a third person, indorsed by him in the firm name, which indorsement was without the knowledge of his partner,—*Held*, that the indorsement was within the authority of the partner making it; and that the firm was liable thereon. *Steuben Co. Bk. v. Alberger.* 203
2. One of two partners on retiring from the business transferred to his copartner his interest in the firm property, each agreeing to pay one-half of its debts. The firm was solvent, but the remaining partner was in fact insolvent at the time. This, however, was not known to him or the retiring partner, and the transfer was made in good faith. In an action wherein creditors of the firm claimed a preference over the individual creditors of the remaining partner, *held*, that by the transfer the title vested in the remaining partner as his own private estate; that he acquired the same dominion over it as if it had always been his own separate property free from any lien or equity on the part of partnership creditors, and that transfers by him of the property in payment of individual debts were lawful. *Stanton v. Westover.* 265
3. In an action to recover damages for breach of a contract to form and continue a partnership for a specified term, the opinion of the witnesses as to the value of the contract to plaintiff, or as to what

would have been his share of the profits had the contract been carried out, is incompetent and its reception error. *Reed v. McConnell.* 270

—*Assets of an insolvent firm may not be reached and applied to payment of individual debt of one of the co-partners. F. E. Co. v. Lewis. (Mem.)* 674

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1. Where an assessment for a local improvement is valid upon its face, but is in fact void because the assessors had no jurisdiction to impose it, an action may be maintained to recover back money involuntarily paid in satisfaction thereof without first having the assessment set aside or vacated. *Bruecher v. Village of Port Chester.* 240
2. Payment to an officer who has a valid warrant for the collection of such an assessment and who threatens to execute the same is not a voluntary payment. *Id.*
3. No demand for a return of the money so paid is necessary before the commencement of an action to recover the same. *Id.*

PENAL CODE.

- § 291. *People, ex rel. v. N. Y. C. Protective.* 195
 § 488. *Malerna v. Horwitz* 469

PHYSICIAN AND SURGEON.

1. The provision of the Code of Civil Procedure (§ 834), prohibiting physicians and surgeons from disclosing information acquired in attending a patient, is applicable to criminal actions. (Code of Crim. Pro., § 392.) *People v. Murphy.* 126
2. Where, upon the trial of an indictment for abortion, a physician, who, after the commission of the alleged crime, attended upon the female upon whose person it was

alleged to have been committed, was allowed to give, as a witness for the prosecution, his opinion as a medical expert, that the crime had been committed, founded upon what he observed as to the physical condition of the woman and upon her narrative of the facts, and it appeared that she was alive at the time of the trial. *Held* error. *Id.*

3. Also *held*, the fact that the physician was selected and sent by the public prosecutor to attend upon the female did not affect the question; that as she accepted his services in his professional character the relation of physician and patient was established between them. *Id.*
4. Also *held*, that although she was a party to the crime, her declarations, which were simply a narrative of a past transaction and constituting no part of the *res gesta*, were not admissible. *Id.*

PIERS.

See WHARVES.

PLEADING.

1. It is essential to the legal statement in a complaint of a cause of action *ex contractu*, that it should allege an existing contract and the performance by plaintiff of such conditions precedent as are thereby provided, or a tender of performance or some adequate excuse for non-performance. *Bogardus v. N. Y. L. Ins. Co.* 328
2. Such an excuse exists only when the defendant has prevented performance by plaintiff, or has himself wholly refused to perform, or has wholly disabled himself from completing a substantial performance. *Id.*
3. The failure of the defendant to perform some of the obligations of the contract which go to a part only of the consideration, when the breach may be paid for in damages, is not sufficient. *Id.*

4. The defendant, by demurring to the complaint in such an action, does not thereby admit the construction put upon the contract by the complaint, or the correctness of the inferences drawn from the facts admitted; he only admits the facts properly stated; and where the contract is set forth, the rights of the parties must be determined by its terms as construed by the court. *Id.*

5. A mere representation made during the pendency of negotiations for a contract is not actionable, even if untrue; it must appear to have been material and made under such circumstances as to show that it was intended as a warranty of the fact represented, and so constituting a contract. A mere allegation in a complaint, therefore, of a representation is not equivalent to an averment of warranty of contract. *Id.*

6. This action was upon a policy of life insurance, issued by defendant, November, 1871, on the Tontine or "ten-year dividend system." A copy of the policy was annexed to and formed part of the complaint. By it the specified annual premium was to be paid each year for ten years, and, in case of default in any payment, the policy was declared null and void and all payments forfeited. It was also declared therein that no dividend should be allowed unless the insured should survive the ten-year dividend period, and unless the policy should then be in force. Aside from the provision for payment of the amount of the insurance, upon the death of the insured, the policy provided, in case he survived the ten-year period, and the policy was then in force, for a payment in cash or annuity bonds of a proportionate share of dividends, accretions, etc., from a fund to be created by certain contributions furnished by a class of policy-holders, consisting of those effecting insurance on the same plan during the year 1871; also, that the surplus and profits derivable from certain described funds belonging to that class should be

equitably apportioned among the surviving policy-holders belonging to the class. In the application for the insurance, the insured consented that defendant might place all dividends accruing on her policy in the reserve fund. The complaint alleged payment of premiums up to November, 1879. This action was commenced in January, 1881. The complaint averred that by the policy defendant bound itself to "receive and keep separate all the premiums paid upon policies of the same class," and all the incomes, profits, etc., accruing therefrom, and alleged as a breach of the contract that defendant had neglected to keep and invest said funds separately. No tender of premiums after November, 1879, or other excuse for non-payment, save the alleged breach on the part of the defendant, was set up; nor was it averred that defendant was insolvent or unable to respond in damages for any breach of contract on its part. On demurrer to the complaint, *held*, that the complaint substantially admitted a non-payment of premiums, and so a breach on the part of the plaintiff of a condition precedent, that the policy did not require a separate investment of the funds belonging to the class which included the policy in suit; and that the consent of the assured to the placing of dividends in a reserve fund did not extend its obligations in this respect, that the averments in the complaint as to defendant's obligations, being simply inferences drawn from the contract itself, were not admitted by the demurrer; but that, assuming the failure to keep the funds separate was a breach of the contract on the part of defendant, it was a breach of an independent agreement, for which it could respond in damages, and was not an excuse for non-payment of the premiums; and that, therefore, the complaint failed to show a cause of action. *Id.*

7. The complaint contained two counts, the first based upon alleged false and fraudulent representations. The averments were

in substance that for the purpose of inducing plaintiff to take out a policy on the Tontine plan, defendant represented that it had received and kept separate, and would continue to do so, the funds belonging to the same class as plaintiff's policy, which representations were relied upon by plaintiff, and were false and fraudulent. In the second count, which was for an alleged breach of the contract, it is stated that plaintiff "repeats and reiterates all the allegations hereinbefore contained and makes them a part of her second cause of action." *Held* that, assuming the averments as to the representations in the first count were incorporated in the second (as to which *quære*), as they were made concurrently with the issuing of the policy, and were necessarily incident to and dependent upon it, the non-performance by plaintiff of the condition precedent, *i. e.*, regular payment of annual premiums, furnished the same defense to an action based thereon; also, that the averments in the first count did not show any cause of action resting in contract, as there was no averment that the representations were a warranty, or were made under such circumstances and in such form as to constitute a contract. *Id.*

8. Where an action to recover a chattel is based solely upon a wrongful detention, a general denial puts in issue, as well, plaintiffs' property in the chattel as the wrongful detention, and defendant under such a plea may show title in a stranger although he does not connect himself with such title. *Griffin v. L. I. R. R. Co.* 848

9. Where an answer, after sufficiently admitting or denying certain allegations of the complaint, denies each and every allegation not thus admitted or denied, this is a good general denial. *Id.*

10. In an action against trustees of a manufacturing corporation to recover a debt of the corporation because of a failure to make and file a report for the year 1877,

four of the defendants joined in an answer, one count of which averred that said defendants failed to make a report for the year 1873, and for each year thereafter, and that more than three years had elapsed since any penalty or claim arose against them in favor of plaintiff. The number of trustees of the corporation was not alleged. On demurrer to this count, *held*, that it was defective, in that it did not aver that defendants were trustees in 1873, or thereafter, previous to 1877; nor did it allege any default by the corporation prior to 1877, as if it was to be assumed that defendants were trustees, still it did not appear and could not be assumed that they constituted a majority of the board, and the corporate duty might have been performed without their joining in the report. *Cornell v. Roach.* 873

— *When supplemental complaint proper after judgment, in action in nature of quo warranto.*

See People, ex rel. Swinburne, v. Nolan. 539

— *Action to recover possession of deed may not be turned into one to compel conveyance or for specific performance.*

See Lackwood v. House. 647

PORT CHESTER (VILLAGE OF).

1. Where, in an action to restrain the sale of plaintiff's lot in the village of Port Chester, and to set aside an assessment thereon for grading a street, it appeared that the charter of the village (§ 4, tit. 5, chap. 818, Laws of 1868) requires the petition for laying out a street to be signed by persons owning land on the line thereof, but does not require the fact of such ownership to be stated in the petition. *Held*, the fact that the petition for opening the street in question did not show on its face that the persons signing it were such owners, did not tend to negative their ownership; and, in the absence of other proof, that the

invalidity of the proceedings in this respect was not established
Tingue v. Village of Port Chester

294

2. Also *held*, that as to other objections which related to matters which might have been corrected on appeal from the report of commissioners, plaintiff was foreclosed by the order of confirmation. *Id.*
3. Also *held*, as it appeared that the parties interested in the lands taken for the street, and among them plaintiff's grantor, who then owned the lot, accepted the awards made to them, and acquiesced in the proceeding, he was concluded from alleging irregularities therein. *Id.*
4. Also *held*, the fact that the specifications upon which the bids for grading were based embraced another street as well as the one in question was immaterial. It appearing that profile maps showing the amount and kind of excavation and filing required on each street were separately made and filed with the specifications. *Id.*
5. Also *held*, that the charter (§ 23, tit. 5) did not require the trustees of the village to pass upon the bids at the time of opening them; that time for comparison of the bids and calculation to determine which was most preferable was essential and might be taken. *Id.*
6. It was objected that the notice of the meeting of the trustees to act in respect to the grading did not describe the district of assessment with sufficient accuracy. The street had then been laid out and the map and report of the commissioners filed. The notice referred to the street by its name and described the assessment district as including "all the lands on both sides of said street to a depth not exceeding one hundred feet." *Held*, that this was a substantial compliance with the charter (§ 23, tit. 5). *Id.*
7. This was a reassessment; the original assessment made in

March, 1874, having been declared invalid and set aside (71 N. Y. 309). *Held*, that there was no legal or valid authority to make a reassessment, that no such authority was conferred by the original charter; that the provision in the act of 1877, amending the charter (Chap. 227, Laws of 1877), which authorized reassessments in certain cases where prior assessment had been set aside or held invalid, only applied to assessments so set aside or held illegal after the passage of the act, and that the act of 1878 (Chap. 277, Laws of 1878), which attempted to authorize reassessments in cases of assessments set aside or vacated, before as well as after the passage of the act, was void as in contravention of the provision of the State Constitution (Art. 3, § 16), directing that a local or private bill shall embrace but one subject, and that shall be expressed in the title. *Id.*

PRACTICE.

1. Proceedings taken during the twenty days that the Code of Remedial Justice was in force were valid if taken under that Code, or under the Code of Procedure, so far as any action was based upon them prior to September 1, 1877, when the Code of Civil Procedure went into effect. *Denman v. McGuire.* 161
2. *It seems* that a judgment for plaintiff in replevin may be entered although the jury has not assessed any damages or found the value of the property; the judgment, however, can only be enforced by execution, not by punishment for contempt. (Code of Civ. Pro., §§ 1730, 1731.) *Hammond v. Morgan.* 173
3. *It seems* that the proper mode of trial of an action in equity is before the court without a jury, unless at the instance of the court or a party, some one or all of the issues are ordered to be tried before a jury, and for that purpose the questions by the jury should be distinctly framed. *Id.*

4. If the facts so determined with those admitted by the pleadings cover the whole case, motion may at once be made for judgment upon which both parties have a right to be heard. The court may order judgment upon the case as so made, or it may set aside the findings of the jury, or use some of them, and it may allow either party to give further evidence. *Id.*
5. If motion for judgment be not at once made, it must be brought on upon motion. *Id.*
6. If the findings and admissions do not cover the whole case, the action must be regularly brought to a hearing before the court, which may adopt or reject the findings of the jury, and receive proof of other facts, and in such case the court must make findings of fact and law. (Code of Civ. Pro., §§ 968-972, 1225.) *Id.*
7. Plaintiff's complaint alleged in substance that he delivered to defendant, to be held by him in trust for plaintiff, an assignment of certain letters-patent, etc., executed to plaintiff by defendant and others, also a release from certain obligations and contracts, which papers defendant refused to deliver upon demand. Judgment was prayed directing defendant to return the papers and for damages because of the detention. The action was put by the plaintiff upon the Special Term calendar, but was stricken therefrom on motion of defendant on the ground that it was an action at law. It was then noticed by plaintiff for trial and was tried at a jury term. The jury rendered a verdict finding the title of the property in the plaintiff and that he should have the return thereof. Plaintiff thereafter on application *ex parte* to the judge who presided at the trial, obtained an order directing judgment ordering defendant forthwith to deliver to plaintiff the instruments so detained, and thereupon judgment was entered as directed. On motion to set aside the order and judgment, *held*, that considering the action either as one in replevin or as an equitable one, the order and judgment were irregular and unauthorized, that defendant did not have a remedy by appeal from the judgment, his only remedy was by motion. *Id.*
8. It seems that where from the nature of the case or of property unlawfully detained, an action in trover or replevin will not give a proper or sufficient relief, an equitable action may be instituted for the specific delivery of the property, judgment in which may be enforced by punishment for contempt, but in such case the facts conferring equity jurisdiction must be alleged and proved. *Id.*
9. The omission to indorse upon a paper served the post-office address or place of business of the attorney, as required by the General Rule of Practice (No. 2), is a mere irregularity and does not necessarily vitiate either the paper or its service. *Evans v. Backer.* 289
10. It seems the omission entitles the party served either to return the paper or move to set it aside, but after receiving it without objection he may not safely disregard it. *Id.*
11. As a general rule it is the office of the Supreme Court to administer its own regulations, and in its discretion to impose such penalties as may have been incurred by attorneys through neglect to comply with those regulations or to relieve therefrom. *Id.*
12. In an action under the Code of Civil Procedure, in the nature of a *quo warranto* (§§ 1983, 1948), in which the person alleged to be rightfully entitled to the office was joined with the people as relator, after final judgment against defendant and in favor of the claimant, the court, in June, 1883, upon motion allowed a supplemental complaint claiming damages in consequence of defendant's intrusion into the office, with leave to answer, and directing the action

to stand over until a day named. *Held* no error; that under the provision of said Code (§ 1953, prior to its amendment by chap. 899, Laws of 1884), as it then stood, which authorized a recovery "in the same action against the defendant," of the damages sustained by the person entitled to the office, and under the provision of the Code allowing supplemental pleadings (§ 544), the order was justified. *People, ex rel. Swinburne, v. Nolan.* 539

13. Where upon a copy of a judgment served was indorsed the name of the attorney with his post-office and business address, and below was indorsed a notice of judgment signed by the attorney without giving any address, *held*, that this was a sufficient compliance with the rule of practice (Rule 2), requiring papers served to be indorsed or subscribed by the attorney, with his address, etc. *People, ex rel. W. V. R. R. Co., v. Keator.* 610

14. For the purposes of an appeal, a judgment in proceedings by *certiorari* to review an assessment under the act of 1880 (Chap. 269, Laws of 1880) is to be considered as an order, and an appeal to this court must be taken within the time prescribed for appeals from orders, *i. e.*, sixty days. *Id.*

15. The rights of parties in a legal action are to be determined as they were at its commencement, unless some event happening subsequently and affecting those already in issue is presented by supplemental pleading. *Styles v. Fuller.* 622

16. Where, therefore, the answer in an action was a general denial, and defendant on the trial offered to prove that after the commencement of the action plaintiff was adjudged a bankrupt and the cause of action passed to his assignee, which offer was rejected. *Held*, no error. *Id.*

— Action to recover possession of deed may not be turned into one to

compel conveyance or for specific performance. *Lockwood v. House.* 647

See APPEAL.

PLEADINGS.

TRIAL.

PRESUMPTIONS.

1. Possession by a stranger of the pass-book of a depositor in a savings bank constitutes no evidence of a right to draw money thereon; to make payments to one having no other evidence of authority than possession of the book a protection to the bank, it is necessary for it to show some special contract with the depositor authorizing such a mode of payment. *Smith v. B'klyn. Sngs. Bk.* 58

2. Since the passage of the acts in relation to the property of married women there is no presumption that the husband is in occupation of his wife's lands; and in an action of ejectment brought against the husband to recover possession of such lands, whether she was occupying them at the time of the commencement of the action, or had given to her husband the possession, is to be determined as a question of fact. *Martin v. Rector.* 77

3. In an action to restrain the sale of land for non-payment of an assessment for a legal improvement and to set aside the assessment because of alleged invalidity in the proceedings, the burden is upon plaintiff to establish the invalidity complained of. There is no presumption in such an action that municipal authorities have acted illegally or that conditions precedent have not been performed. *Tingue v. Village of Port Chester.* 294

4. The distinction between such a case and one where the owner of a tax title seeks to enforce it by action pointed out. *Id.*

PRINCIPAL AND AGENT.

The parties entered into a contract

by which defendants agreed to sell the goods manufactured by plaintiff on commission. Plaintiff guaranteed to supply defendants with goods to at least the value of a sum specified, and in case of failure so to do defendants were entitled to the agreed commissions on that sum. Either party had the right to terminate the agreement by giving to the other a year's notice. In an action to recover proceeds of sales in defendants' hands, the referee found that plaintiff was led, by acts and assurances of defendants, to believe that they would only charge commissions thereafter on actual shipments, and were induced thereby to refrain from giving notice of a termination of the agreement. *Held*, that defendants were estopped from claiming thereafter commissions under the guaranty in the contract. *Belgian Glass Co. v. Pabst.* 621

— *Where agent contracting in his own name liable as principal.*
See *Newman v. Greeff.* (Mem.) 663

PRIVATE WAYS.

1. In proceedings under the statute (Chap. 174, Laws of 1853) to lay out a private road exact and technical accuracy is not required, but simply a substantial compliance with the statute. *Satterly v. Winne.* 218
2. A description in an application by reference to a private way used by permission of the owner of the land for a great number of years, so that it has come to be called a road, is sufficiently definite. *Id.*
3. The statute does not require that the courses shall be specified by the compass in degrees and minutes; and where the general course is given, as easterly, etc., and the exact course and distance can be determined from other particulars in the application, or by natural monuments referred to therein, the statute is substantially complied with. *Id.*

4. An application for a private road gave the width of the proposed road, and described it as "beginning at a pair of bars at the westerly terminus of a road known as the Winne road," a private way so called which had been used with the consent of the owner for over sixteen years, and by such user had become plainly marked on the ground; the description continued, "running from thence (said bars) easterly along the bed of the said Winne road," and the distances also were given approximately. *Held*, that the center line of the "Winne road-bed must be considered as intended to be the line described in the application; and, that the reference to said road was a sufficient specification of location, courses," etc., as required by the statute. *Id.*

5. Where an order of commissioners laying out a private road was indefinite and defective, but referred to the application, declaring that the commissioners had ordered the road to be laid out pursuant to the application, *held*, that the description in the application should be considered as incorporated in the order; that it controlled and determined the *locus* of the road. *Id.*

6. *It seems* if the jury in such proceedings find in favor of laying out the road, the commissioners are bound to lay it out as described in the application; they have no discretion either to refuse to lay it out, to change its location, or to depart in any respect from the road proposed by the applicants. *Id.*

PRIVILEGED COMMUNICATIONS.

1. The provision of the Code of Civil Procedure (§ 834) prohibiting physicians and surgeons from disclosing information acquired in attending a patient is applicable to criminal actions. (Code of Criminal Procedure, § 392.) *People v. Murphy.* 126

2. Where, upon the trial of an in-

dictment for abortion, a physician, who after the commission of the alleged crime attended upon the female upon whose person it was alleged to have been committed, was allowed to give, as a witness for the prosecution, his opinion as a medical expert, that the crime had been committed, founded upon what he observed as to the physical condition of the woman and upon her narrative of the facts, and it appeared that she was alive at the time of the trial. *Held error. Id.*

3. Also *held*, the fact that the physician was selected and sent by the public prosecutor to attend upon the female did not affect the question; that as she accepted his services in his professional character the relation of physician and patient was established between them *Id.*

4. Also *held*, that although she was a party to the crime, her declarations, which were simply a narrative of a past transaction and constituting no part of the *res gestae* were not admissible. *Id.*

PROFESSIONAL COMMUNICATIONS.

See PRIVILEGED COMMUNICATIONS.

PROMISSORY NOTES.

See BILLS, NOTES AND CHECKS.

PUBLIC POLICY.

Prior to the passage of the Penal Code, which makes it a misdemeanor to sell, or offer for sale, any package of goods falsely marked as to place where manufactured, quality or grade (§ 438), a contract for the sale of goods to be furnished with deceptive labels, intended by the parties and calculated to deceive customers of the purchaser, was against public policy, and the courts will not aid either party to enforce such a contract. Where, therefore, plaintiffs

contracted to sell and deliver to defendants domestic sardines, with labels upon the boxes representing that they were put up at foreign ports by firms there engaged in the sardine trade, it being known to both parties that the labels were used to deceive the consumers. *Held*, that plaintiffs were not entitled to maintain an action to recover the contract-price for the sardines, which plaintiffs tendered, but defendants refused to accept and pay for. *Materne v. Horwitz.*

469

PUBLICATION.

An affidavit, upon which an order for service of summons by publication under the Code of Procedure (§ 135) was granted, stated that the defendants "cannot after due diligence be found within this State," that they were residents of other States named, and that the summons "was duly issued for said defendants, but cannot be served personally upon them by reason of such non-residence." *Held*, that the affidavit was sufficient to sustain the order and to give the court jurisdiction, at least where collaterally brought in question. *Kennedy v. N. Y. L. Ins. and T. Co.*

487

QUESTIONS OF LAW AND FACT.

— When question as to contributory negligence one of fact
See *Greany v. L. I. R. R. Co.* 419

— When questions as to negligence and contributory negligence are of fact.

See *Allison v. Village of M. (Mem.)*

667

QUO WARRANTO.

1. In an action under the Code of Civil Procedure, in the nature of a *quo warranto* (§§ 1988, 1948), in which the person alleged to be rightfully entitled to the office was joined with the people as relator, after final judgment against defendant and in favor of the claim-

ant, the court, in June, 1888, upon motion allowed a supplemental complaint claiming damages in consequence of defendant's intrusion into the office, with leave to answer, and directing the action to stand over until a day named. *Held* no error; that under the provision of said Code (§ 1953, prior to its amendment by chap. 399, Laws of 1884), as it then stood, which authorized a recovery "in the same action against the defendant," of the damages sustained by the person entitled to the office, and under the provision of the Code allowing supplemental pleadings (§ 544), the order was justified. *People, ex rel. Swinburne, v. Nolan.*

539

2. The relator in such an action is entitled to recover as damages the salary or emoluments received by defendant while he unlawfully held the office. *Id.*
3. As to whether, under any circumstances, these damages may be diminished, *quære.* *Id.*
4. Taking the oath and a demand of possession of the office are not conditions precedent to the relator's right of recovery; it is not a part of the plaintiff's case to show that the relator was prepared to enter upon the duties of the office, nor is it any defense that conditions precedent to their performance have not been observed by him. *Id.*
2. Where, however, the railroad is built, with proper care and skill, after the public rights and the private property, if any, in the highway, or the soil thereof, have been acquired, it is not a nuisance, and the owners of the railroad are not responsible for any damages to private property, adjacent or near to the road, necessarily resulting from its construction or operation. *Id.*
3. Where, therefore, a railroad corporation, having acquired all private rights in a city street, and authority from the municipality, raised the grade of the street in front of defendant's adjoining lots so as to conform the grade of the street to the grade of the railroad crossing it, exercising proper care and prudence in doing the work, *held*, in the absence of any allegation or proof that the street as such was in any way injured for travel, or its usefulness unnecessarily impaired, defendant was not liable for the consequential damages to plaintiff's lots; that as the city could have raised the grade of the street without liability to abutting owners, it could authorize the defendant to do so without such liability. *Id.*
4. Where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action; and it seems for any damages thereafter sustained, other actions may be brought successively until the nuisance shall be abated. The structure being a nuisance the railroad company is under legal obligation to remove it, and it is not to be presumed that it will continue it permanently. Damages, therefore, may not be awarded upon that assumption, nor will the judgment operate as a purchase of the right to have the structure remain. *Id.*
5. Accordingly *held*, that proof and an allowance as damage for the permanent diminution in the market value of plaintiff's lots was improper, conceding that the em-

RAILROAD CORPORATIONS.

1. To authorize the construction of a railroad upon or over a highway, where individuals own private rights or interests therein, or in the soil thereof, not only must the public right or license be obtained, but the individual rights and interests must be lawfully acquired; and if constructed without such acquisition, the builders are trespassers and are liable for all the damages sustained by the owners of such rights and property as to whom the railroad is a continuing nuisance. *Ulns v. N. Y. C. & H. R. R. Co.*

98

bankment was unlawfully constructed. *Id.*

6. *It seems* that where a railroad is unlawfully constructed in a street the adjacent owner has these remedies; he may bring successive suits to recover his damages; he may bring an action in equity to restrain the operation of the road and compel the abatement of the nuisance, or when the highway has been exclusively appropriated, he may maintain an action of ejectment.

Id.

7. The "tunnels, tracks, substructures, superstructures, stations, viaducts and masonry" of the N. Y. & H. R. R. Co., situate on and under Fourth avenue in the city of New York are "land" within the meaning of that word as used in the statute in reference to property liable to taxation (1 R. S. 387, § 2), and are assessable as such. *People, ex rel. N. Y. & H. R. R. Co., v. Com'rs of Taxes, etc.* 822

8. The fact that certain of the structures were built for the purpose of furnishing to the public safe and convenient crossings over the railroad tracks, in compliance with the requirements of the act of 1873 (Chap. 702), and that under said act the city is required to pay a portion of the expense of the construction, does not divest the structures of the incidents attached to the other property belonging to the railroad company, or give the city any title thereto. *Id.*

9. As regards taxation it is immaterial whether a railroad is laid upon the surface, placed on pillars, or carried through a covered way or tunnel, the structures adopted to sustain it, or facilitate and protect its use, are, within the meaning of the law, land, and for them the railroad company is liable to be taxed. *Id.*

10. Where a passenger on a railroad, by an illegal refusal to pay fare, renders it the duty of the conductor in enforcing the reasonable rules and regulations of the company to eject him from the cars,

and the refusal and resistance of the passenger continues until after force has been required and applied to remove him, he cannot, by offering to pay fare, make the continuance of the process of expulsion unlawful; and, although he is ejected after an offer to pay fare, at a place where the train ordinarily stops and receives passengers, this does not render the railroad company liable. *Pease v. D., L. & W. R. R. Co.* 867

11. A carrier of passengers is not required unconditionally to accept all persons who offer themselves for transportation and tender fare; he may lawfully decline to receive or carry those who refuse to conform to his reasonable rules after knowledge of the same, or may after such refusal lawfully eject those who have been received. *Id.*

12. Plaintiff boarded a train on defendant's road; when the conductor in collecting fares reached him he presented an invalid ticket, which the conductor refused to accept, and demanded fare. This plaintiff refused to pay. The conductor informed him that he would be obliged to put him off unless he paid. He replied that he would sue the company if he was put off. This occurred as the train reached a place where the track was crossed by another railroad at grade, and where, in compliance with the statute, trains on defendant's road stopped for a moment, and where passengers were in the habit of getting on and off. The conductor called for assistance; a brakeman and baggageman came and began the removal. Plaintiff resisted and continued the struggle without cessation until he was landed on the track. When he reached the car door, and again while on the platform, he stated he would pay the fare. The court charged that if the train had stopped at a station and before it started again plaintiff offered to pay his fare, any subsequent effort to remove him was unlawful and rendered defendant liable for damages. *Held error.* *Id.*

13. In an action against a railroad company to recover for injuries sustained at a crossing, where the negligence alleged was the failure to ring a bell or blow a whistle as the train approached the crossing, testimony of passengers on the train, who were in a position to have heard, that they did not hear either of these signals, is competent, although it does not affirmatively appear that they were looking, watching or listening therefor. *Greany v. L. I. R. R. Co.* 419

14. Where in such an action there is any evidence, direct or inferential, of care or caution on the part of the person injured, the question as to contributory negligence is for the jury. *Id.*

15. While a person approaching a crossing is bound to make all reasonable efforts to see, that a careful, prudent man would make in like circumstances, his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal. *Id.*

16. In such an action plaintiff's testimony was to the effect that she lived north of defendant's road; she was going south from her home upon a highway which crossed the tracks of said road at a station located south of the tracks. As she approached the crossing, a train going east on the south track stopped at the station; its cars reached across the highway, leaving no room to pass. She stopped for awhile, and then proceeded; she stopped again as she reached the north track; just then the train started up. She testified that as she came up to the track, she looked both ways "along the track, and saw no engine," except that of the train at the station. She took a step or two to cross, and as she did so, saw a train coming from the east on the north track, but so close that she could not escape, and she was struck by it and injured. This occurred in

what seemed to the witness not more than a few seconds after she had looked up and down the track. The trains did not usually meet at the station, but the one going east was behind time. On cross-examination the plaintiff testified that if she had looked earlier, she might have seen the train, but did not think there was any need of looking more than once, and did not think there was any other train due at that time; that she had looked a few seconds before, and then went on. The engine at the station was blowing off steam, and she did not hear any bell or whistle from the approaching train. This there was testimony tending to show was running at a dangerous rate of speed. *Held*, that the question of contributory negligence was properly submitted to the jury. *Id.*

— Where railroad corporation make application to acquire title to uplands on bank of river, it is no objection on appeal from order confirming report of commissioners awarding damages, that the company propose to build an embankment in front of owner's premises, cutting his pier off from river; if his rights have been unlawfully interfered with, his remedy is by action, not by appeal.

In re N. Y., W. S. & B. R. Co. (Mem.) 685

REAL PROPERTY.

1. The "tunnels, tracks, substructures, superstructures, stations, viaducts and masonry" of the N. Y. & H. R. R. Co. situate on and under Fourth avenue in the city of New York, are "land" within the meaning of that word as used in the statute in reference to property liable to taxation (1 R. S. 387, § 2), and are assessable as such. *People, ex rel. N. Y. & H. R. R. Co., v. Com'rs of Taxes.* 322

2. A person cannot acquire title to land, which is uninclosed, unoccupied and unimproved, by taking a deed thereof from one not the owner and then going upon the

land and asserting his ownership, or making occasional entries upon the land for grass or sand. *Price v. Brown.* 669

RECEIVERS.

1. A receiver of an insolvent national bank acquires no right to property in the custody of the bank, which it does not own, as against the owner, and the provision of the United States Revised Statutes (§ 5242), prohibiting the issuing of an attachment, injunction or execution against such a corporation before final judgment, was not intended to protect the receiver's custody as against such owner. *Corn Ex. Bk. v. Blye.* 803
2. Accordingly *held*, that said provision did not prohibit the issuing, in an action against the receiver of a national bank to recover possession of personal property, of a requisition directing the sheriff to take into his possession the property in question; that the receiver, if he desired to retain possession of the property during the litigation, could only do so by giving the security required, the same as other defendants in such an action. *Id.*
3. The act of 1883 (Chap. 378, Laws of 1883), in relation to receivers of corporations, including the second section thereof, in reference to receiver's fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in said section. *U. S. Trust Co. v. N., Y. W. S. & B. R. Co.* 478
4. The allowance of commissions to such a receiver is governed by the provision of the Code of Civil Procedure (§ 8320), providing for the allowance by the court or the judge where not "otherwise specially prescribed by statute." *Id.*

RECOVERY OF POSSESSION OF REAL PROPERTY.

See EJECTMENT.

REMEDIES.

1. *It seems* that where a railroad is unlawfully constructed in a street, the adjacent owner has these remedies: he may bring successive suits to recover his damages; he may bring an action in equity to restrain the operation of the road and compel the abatement of the nuisance, or when the highway has been exclusively appropriated, he may maintain an action of ejectment. *Uline v. N. Y. C. & H. R. R. Co.* 98
2. Plaintiff's complaint alleged in substance that he delivered to defendant, to be held by him in trust for plaintiff, an assignment of certain letters-patent, etc., executed to plaintiff by defendant and others, also a release from certain obligations and contracts, which papers defendant refused to deliver upon demand. Judgment was prayed directing defendant to return the papers and for damages because of the detention. The action was put by the plaintiff upon the Special Term calendar, but was stricken therefrom on motion of defendant on the ground that it was an action at law. It was then noticed by plaintiff for trial and was tried at a jury term. The jury rendered a verdict finding the title of the property in the plaintiff and that he should have the return thereof. Plaintiff thereafter, on application *ex parte* to the judge who presided at the trial, obtained an order directing judgment ordering defendant forthwith to deliver to plaintiff the instruments so detained, and thereupon judgment was entered as directed. On motion to set aside the order and judgment, *held*, that considering the action, either as one in replevin or as an equitable one, the order and judgment were irregular and unauthorized; that defendant did not have a remedy by appeal from the judgment, his only remedy was by motion. *Hammond v. Morgan.* 179

8. *It seems that where from the nature of the case or of property unlawfully detained, an action in trover or replevin will not give a proper or sufficient relief, an equitable action may be instituted for the specific delivery of the property, judgment in which may be enforced by punishment for contempt, but in such case the facts conferring equity jurisdiction must be alleged and proved.* *Id.*

4. Errors and irregularities in assessments for street openings in the city of New York must be corrected and reviewed in the proceedings themselves; they cannot be reached by a collateral action in equity. An order confirming the assessment has the force and conclusiveness of a judgment. *Mayer v. Mayor, etc.* 284

5. *It seems the remedy of a purchaser of real estate, if the vendor refuses to surrender the possession, is by action of ejectment alone, in which he may recover damages by way of mesne profits for the unlawful withholding of possession.* *Preston v. Hawley.* 536

— *When remedy by one unlawfully dispossessed of an office is by action in nature of quo warranto, and when by action to recover damages.*

See Nichols v. MacLean. 526

— *When consideration of question as to constitutionality of law authorizing a local improvement properly refused on motion to vacate appointment of commissioners and party left to his remedy by action.*

See In re Opening, etc., of Flushing Ave. (Mem.) 678

— *Where railroad corporation make application to acquire title to uplands on bank of river, it is no objection on appeal from order confirming report of commissioners awarding damages that the company propose to build an embankment in front of owner's premises cutting his pier off from river; if his rights have been unlawfully interfered with his remedy is by action not by appeal.*

In re N. Y., W. S. & B. R. Co. (Mem.) 685

REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

RESTITUTION.

1. Where, on reversal of a judgment, this court directed immediate restitution of certain real estate of which one of the appellants had been dispossessed by means of the erroneous judgment, and that the *mesne* profits up to the time of the restitution be ascertained and paid to him, *held*, the intent was to provide for the same compensation for withholding the real estate to which the appellant would have been entitled on recovering the same in an action of ejectment; and that an order entered upon the decision providing that "the value of the rents and profits" be ascertained was substantially in accord with the decision. *Wallace v. Berdell.* 18

2. The provisions of the Code of Civil Procedure (§§ 1496, 1531), providing for recovery in an action of ejectment as damages for withholding the property, "the rents and profits, or the value of the use and occupation of the property," may be regarded as the legislative definition of the ancient technical term "*mesne profits*," *Id.*

3. The owner of the property withheld is not confined to the rents actually received by the party required to make restitution. The owner should have either these or the rental value, as may be just under the circumstances. *Id.*

4. The *mesne* profits consist of the net rents, rental value, or value of the use and occupation, and in ascertaining either, all necessary payments for taxes and ordinary repairs are to be deducted. *Id.*

5. The order of restitution contained a provision not contained in the decision, to the effect that the restitution and payment should be without prejudice to the right of the owner to commence and main-

tain any suit or proceeding for waste or injury to the property. *Held*, that while, perhaps, the provision was superfluous, as it was not the intent of the court to deprive said owner of any such right of action, if he had any, the order as entered was proper. *Id.*

RIPARIAN OWNER.

See LITTORAL PROPRIETOR.

RIPARIAN PROPRIETOR.

— *Where railroad corporation make application to acquire title to uplands on bank of river, it is no objection on appeal from order confirming report of commissioners awarding damages that the company propose to build an embankment in front of owner's premises cutting his pier off from river; if his rights have been unlawfully interfered with his remedy is by action not by appeal.*

In re N. Y., W. S. & B. R. Co.
(*Mem.*) 685

RULES.

1. The omission to indorse upon a paper served the post-office address or place of business of the attorney, as required by the General Rule of Practice (No. 2), is a mere irregularity and does not necessarily vitiate either the paper or its service. *Evans v. Backer.* 289
2. Where upon a copy of a judgment served was indorsed the name of the attorney with his post-office and business address, and below was indorsed a notice of judgment signed by the attorney without giving any address, *held*, that this was a sufficient compliance with the rule of practice (Rule 2), requiring papers served to be indorsed or subscribed by the attorney, with his address, etc. *People, ex rel. W. V. R. R. Co., v. Keator.* 610

SALES.

1. A contract for the sale of goods may not be predicated on an offer which was modified or withdrawn before an unconditional acceptance. *Schenectady Store Co. v. Holbrook.* 45
2. Under an offer of immediate sale, the buyer cannot extend the times of payment, by postponing the time of delivery, without the vendor's consent. *Id.*
3. On August 16, 1879, plaintiff, in answer to a request from the defendant's firm, gave by letter its prices for certain goods, with this statement, "this price only to hold good till thirtieth September." On September twenty-second defendants sent an order, with directions to have the goods ordered put up and marked in a specified way, and sent in five or six shipments, at intervals of ten days or two weeks. In September, prior to the giving of the order, C., an agent of the plaintiff, had made to defendants, a proposition, modifying slightly the written offer; plaintiff on September twenty-fifth, wrote defendants, acknowledging receipt of order, giving their understanding of the terms proposed by C.; on September twenty-ninth, defendants sent another order, claiming, however, that the prices given by C. were less than as stated by plaintiff; plaintiff returned the order, with letter, stating it was beyond its power to accept. In an action to recover for the goods delivered under the first order, defendants set up as a counter-claim, damages for failure to fill the second order. *Held* untenable; that no contract was made for the sale of the goods specified in such order. *Id.*
4. Plaintiff purchased of defendant certain personal property covered by a chattel mortgage; the latter gave a bill of sale by which he covenanted "to warrant and defend the sale," and a writing by which he certified that the chattel mortgage would thereafter be paid by him; not having been paid it

was foreclosed and the property was purchased by N. for \$700, the amount due on the mortgage. N. claimed the property, and plaintiff paid him \$1,000 therefor. In an action to recover damages for the breach of defendant's agreements plaintiff recovered the amount due on the mortgage. *Held* no error; that no actual eviction was necessary to sustain the action; that as he could not withhold the property from the purchaser without becoming a wrongdoer, his submission, although peaceable, was not voluntary. *Cahill v. Smith.* 855

5. Defendant contracted to sell plaintiff ten car-loads of iron—"C) Blooms"—to be delivered "as fast as they may be produced, small enough to meet the usual requirements of measure." Five car-loads were delivered. In an action to recover damages for non-delivery of the residue, *held*, the contract required, not simply that the blooms should be delivered as fast as they were actually produced, but that they should be produced in the ordinary operations of defendant's forge, with reasonable diligence and by reasonable and proper efforts, and defendant was not authorized to stop the production from motives of economy or convenience. *Stewart v. Marvel.* 857

6. Defendants contracted to sell and deliver to plaintiffs one hundred and seventy-five cases Connecticut tobacco, guaranteed "to be like samples." On receipt of bill plaintiffs paid for the purchase, by giving their promissory note for the amount. The tobacco delivered proved to be Massachusetts tobacco, which was of less value than the Connecticut; some of the cases were also inferior to the samples. Defendants were notified of the defects, and requested to return the note and take back the tobacco, but refused so to do, it was then, upon notice to defendants, sold at auction, in one lump. In an action to recover damages for breach of the contract, *held*, that plaintiffs' sale of the tobacco in a lump did

not defeat their right to recover; that the measure of damages was the difference in value of the tobacco as warranted, and that actually delivered; and, to ascertain the latter, in the absence of other testimony, the amount received at the auction sale was properly resorted to. Also *held*, the fact that a note was given for the purchase-price, which it did not appear had been paid, did not defeat a recovery; that, under the circumstances, plaintiffs' liability on the note must be deemed the equivalent for cash. *Bach v. Levy.* 511

7. A payment, to take an oral contract for the sale of goods, for the price of \$50 or more, out of the statute of frauds, must be made at the time of the contract. (2 R. S. 136, § 3.) A payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior agreement valid; there must be additional proof sufficient to show that at the time of the payment, the terms of the prior oral contract were in the minds of the parties and were reaffirmed by them. In which case a cause of action arises not on the prior oral contract, but on the new agreement. *Jackson v. Tupper.* 515

8. Such a prior void contract, however, may be validated by a subsequent receipt and acceptance, pursuant thereto, by the buyer, of the goods or a portion of them. *Id.*

9. Where an executory contract for the sale of goods is with warranty, that they shall be good, sound, and all right, and equal to a sample shown, an acceptance of the goods after opportunity to examine them does not preclude the purchaser from claiming and recovering damages for breach of the warranty. *Kent v. Friedman.* 616

— *Sufficiency of written note or memorandum to take contract for sale of goods for the price of \$50 or over out of statute of frauds.* *Doughty v. M. B. C. (Mem.)* 644

SAVINGS BANKS.

1. Possession by a stranger of the pass-book of a depositor in a savings bank constitutes no evidence of a right to draw money thereon; to make payments to one having no other evidence of authority than possession of the book a protection to the bank, it is necessary for it to show some special contract with the depositor authorizing such a mode of payment. *Smit v. B'klyn Sogs. Bk.* 58
2. In a pass-book issued by defendant to a depositor was a printed by-law, a portion of which is as follows: "All payments made by the bank upon the presentation of the pass-book, and duly entered therein, will be regarded as binding upon the depositor; money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass-book." *Held*, that the by-law contemplated but two modes of payment, one to the depositor personally, the other upon his written order, both requiring the presentation of the pass-book as the condition thereof; and that it did not authorize or protect the bank in a payment to a stranger whose only evidence of authority to receive it was the possession of the pass-book. *Id.*
3. Also *held*, that it was error for the trial court to exclude evidence tending to show want of care and prudence on the part of the bank in making such payments. *Id.*

SEA.

When soil has been wrongfully deposited by human hands in the ocean or other public waters, in front of the uplands, so that the water-line is carried further out, the same rule applies as when such a deposit has been gradually made by natural causes. *i. e.*, the accretion becomes the property of the owner of the upland, and his title still extends to the water-line. *Steers v. City of B'klyn.* 51

SERVICE (AND PROOF OF).

An affidavit, upon which an order for service of summons by publication under the Code of Procedure (§ 185) was granted, stated that the defendants "cannot after due diligence be found within this State," that they were residents of other States named, and that the summons "was duly issued for said defendants, but cannot be served personally upon them by reason of such non-residence." *Held*, that the affidavit was sufficient to sustain the order and to give the court jurisdiction, at least where collaterally brought in question. *Kennedy v. N. Y. L. Ins. & T. Co.* 487

SOCIETIES.

See CORPORATIONS.

STATUTES.

- Chap. 17, *Laws of 1865.*
- Chap. 181, *Laws of 1875.*
- See Board of Water Com'rs v. Dwight*, 9.
- Chap. 625, *Laws of 1857.*
- Chap. 856, *Laws of 1869.*
- See Jefferson v. People*, 19.
- Chap. 40, *Laws of 1848.*
- See Butler v. Smalley*, 71.
- Chap. 812, *Laws of 1859.*
- Chap. 327, *Laws of 1873.*
- Chap. 851, *Laws of 1874.*
- Chap. 49, *Laws of 1876.*
- Chap. 80, *Laws of 1880.*
- See People, ex rel., v. City of Kingston*, 83.
- Chap. 863, *Laws of 1873.*
- See Poillon v. City of B.*, 132.
- Chap. 136, *Laws of 1861.*
- Chap. 521, *Laws of 1857.*
- See Seifert v. City of B.*, 136.
- Chap. 367, *Laws of 1863.*
- Chap. 697, *Laws of 1867.*
- Chap. 288, *Laws of 1868.*
- Chap. 383, *Laws of 1870.*
- Chap. 872, *Laws of 1873.*
- See In re Knaust*, 188.
- Chap. 443, *Laws of 1863.*
- Chap. 410, *Laws of 1862.*
- See People, ex rel., v. N. Y. C. Protective*, 195.
- Chap. 174, *Laws of 1853.*

See Satterly v. Winne, 218.
 — *Chap. 1, Laws of 1816*.
See Hildreth v. City of Troy, 234.
 — *Chap. 410, Laws of 1882*.
See Mayer v. Mayor, etc., 284.
 — *Chap. 227, Laws of 1877*.
 — *Chap. 277, Laws of 1878*.
See Tingue v. Port Chester, 294.
 — 2 R. S. 151, § 5.
 — *Chap. 400, Laws of 1887*.
 — 2 R. S. 93, § 61.
See Davis v. Crandall, 311.
 — 1 R. S. 387, § 2.
 — *Chap. 702, Laws of 1872*.
See People, ex rel., v. Com're, 322.
 — *Chap. 40, Laws of 1848*.
See Cornell v. Roach, 373.
 — *Chap. 132, Laws of 1835*.
 — *Chap. 41, Laws of 1839*.
See K. C. F. Ins. Co. v. Stevens, 411.
 — *Chap. 381, Laws of 1884*.
See Linderman v. Farquharson, 434.
 — 1 R. S. 768, §§ 6, 8.
See G. N. Bank v. Taaks, 442.
 — *Chap. 378, Laws of 1883*.
See U. S. T. Co. v. N. Y., W. S. & B. R. Co., 478.
 — *Chap. 907, Laws of 1869*.
 — *Chap. 925, Laws of 1871*.
 — *Chap. 146, Laws of 1880*.
 — *Chap. 75, Laws of 1878*.
 — *Chap. 817, Laws of 1878*.
See Hills v. P. S. Bank, 489.
 — *Chap. 466, Laws of 1877*.
 — 1 R. S. 678, § 55.
See R. W. Co. v. Fielding, 504.
 — 2 R. S. 136, § 3.
See Jackson v. Tupper, 515.
 — *Chap. 399, Laws of 1884*.
See People, ex rel., v. Nolan, 589.
 — *Chap. 269, Laws of 1880*.
See People, ex rel., v. Keator, 610.
 — *Chap. 163, Laws of 1878*.
See Lord v. Y. F. G. Co., 614.
 — *Chap. 360, Laws of 1882*.
See People v. Donovan, 632.
 — *Chap. 269, Laws of 1880*.
See People, ex rel., v. Com're, 651.
 — 2 R. S. 135, § 2.
See Doughty v. M. B. Co. (Mem.), 644.
 — *Chap. 326, Laws of 1881*.
See In re Opening of Flushing Ave. (Mem.), 678.
 — *Chap. 140, Laws of 1850*.
See In re N. Y., W. S. & B. R. Co. (Mem.), 685.

STATUTE OF FRAUDS.

1. A payment, to take an oral con-

tract for the sale of goods, for the price of \$50 or more, out of the statute of frauds, must be made at the time of the contract (2 R. S. 136, § 3.) A payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior agreement valid; there must be additional proof sufficient to show that at the time of the payment, the terms of the prior oral contract were in the minds of the parties and were re-affirmed by them. In which case a cause of action arises not on the prior oral contract, but on the new agreement. *Jackson v. Tupper*. 515

2. Such a prior void contract, however, may be validated by a subsequent receipt and acceptance, pursuant thereto, by the buyer, of the goods or a portion of them. *Id.*

— *Sufficiency of written note or memorandum to take contract for sale of goods for the price of \$50 or over out of statute of frauds.*

Doughty v. M. B. Co. (Mem.) 644

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STREETS.

See HIGHWAYS.

SUMMONS.

An affidavit, upon which an order for service of summons by publication under the Code of Procedure (§ 135) was granted, stated that the defendants "cannot after due diligence be found within this State," that they were residents of other States named, and that the summons "was duly issued for said defendants, but cannot be served personally upon them by reason of such non-residence." *Held*, that the affidavit was sufficient to sustain the order and to give the court jurisdiction, at least where collaterally brought in

question. *Kennedy v. N. Y. L. Ins. & T. Co.* 487

SUPERVISORS.

1. Under the statutes regulating appeals to the State assessors from equalizations made by boards of supervisors, of the valuation of property in their respective counties (Chap. 312, Laws of 1859; chap. 327, Laws of 1873; chap. 351, Laws of 1874; chap. 49, Laws of 1876; chap. 80, Laws of 1880), where such an appeal is dismissed, the costs and expenses incurred by the board may be charged against the town, city or ward appealing. *People, ex rel. Suprs Ulster Co., v Common Council* 82
2. Under said acts the employment of necessary appraisers and searchers by the board at a reasonable *per diem* compensation, and the necessary disbursements in preparing for the investigation are legal items of expenses chargeable under the statute; and the decision of the board of supervisors — the auditing board created by the acts — as to the amount and reasonableness of the expenses incurred, in the absence of fraud or collusion, is final and conclusive. *Id.*
3. It was within the power of the legislature to constitute the board of supervisors a board to audit the expenses chargeable upon the party appealing. In making the audit the members of the board simply discharge a duty of public administration, cast upon them by law, and are neither within the letter nor the spirit of the statute prohibiting a judge from sitting in a case in which he is a party or is interested. *Id.*
4. At a meeting of the board of supervisors of the county of U. bills of expenses, duly verified, incurred by it in equalization proceedings, were presented. The supervisors and council of the city of K., the party appealing, had notice as early as November thirteenth of the amount of expenses claimed to have been incurred by the board.
- On November twenty-first, the board, then in session, appointed a committee to examine the bills and report thereon. On December first, the counsel for the city notified the committee that the city desired to be heard. On December third, the committee made a report to the board, and upon its being read, the supervisors of the city requested that consideration thereof be postponed until the next day in order to give them time to examine the bills and present objections; the board, however, proceeded to act upon the report and made the audit, no specific objections being made by the city supervisors to any of the items; it was the practice of the board to adjourn on the fifth. In proceedings by *mandamus* to compel the common council of the city to levy and collect the sum audited, *held*, that under the circumstances disclosed, no legal right of the city was invaded by the denial of the application for delay. *Id.*
5. Also *held*, that the board of supervisors had such an interest, in enforcing the collection of the costs that it could authorize the proceedings; that the expenses, when incurred, were, in the first instance, on its credit, and so were county charges, it simply having a remedy over against the city in case the latter failed on its appeal. *Id.*
6. The board passed a resolution on December fourth, authorizing the employment of counsel named, "in all matters in litigation" growing out of the equalization, and authorizing him "to take all necessary and proper proceedings in the name of the board;" subsequently a committee of its members was appointed with full power to do all things necessary in the litigation. *Held*, that ample authority was thus conferred to institute the proceedings. *Id.*
7. The charter of the city provides a special system for the collection of taxes therein. It was objected that the charge against the city could not be enforced. *Held* untenable; that the direction in the act of 1873 (Chap. 327, Laws of 1873), requir-

ing the sum audited by the board of supervisors to be "levied upon the taxable property in said * * * city," is to be carried out by causing the same to be levied in the usual way provided for levying and collecting taxes in the city. *Id.*

SUPREME COURT.

As a general rule it is the office of the Supreme Court to administer its own regulations, and in its discretion to impose such penalties as may have been incurred by attorneys through neglect to comply with those regulations or to relieve therefrom. *Evans v. Backer.* 289

SURGEON.

See PHYSICIAN AND SURGEON.

SURROGATE'S COURT.

— Jurisdiction of surrogate to appoint guardian for infant on settlement of executor's accounts and when decree not binding upon infant.

See *Davis v. Crandall.* 311

TAXATION.

See ASSESSMENT AND TAXATION.

TITLE.

1. When soil has been wrongfully deposited by human hands in the ocean or other public waters, in front of the uplands, so that the water-line is carried further out, the same rule applies as when such a deposit has been gradually made by natural causes, i. e., the accretion becomes the property of the owner of the upland, and his title still extends to the water-line. *Steers v. City of Brooklyn.* 51
2. In an action of ejectment, plaintiff claimed title under a deed which she alleged had been executed and delivered to her by her mother, who afterward obtained possession thereof and destroyed it, and then

deeded the land to defendant, who had full knowledge of the previous conveyance. Plaintiff proved by several witnesses that she had in her possession a deed purporting to convey the premises, to be executed under seal by her mother, and to be acknowledged before L., a justice of the peace; also that such a deed was delivered to her by her mother, and placed by her in her bureau drawer, from which it was subsequently taken by the mother and burned on account of her displeasure at her daughter's marriage. Plaintiff also proved admissions on the part of defendant that the deed in question had been executed at his suggestion, as claimed by plaintiff; that it was acknowledged before L., and that he, with full knowledge thereof, subsequently purchased the property, believing the deed did not amount to any thing, as it was not recorded and had been destroyed. *Held*, the evidence justified a finding that the deed to plaintiff was duly executed, acknowledged and delivered. *Simmons v. Hacens.* 427

3. A person cannot acquire title to land, which is uninclosed, unoccupied and unimproved, by taking a deed thereof from one not the owner and then going upon the land and asserting his ownership, or making occasional entries upon the land for grass or sand. *Price v. Brown.* 669

TOWN BONDING.

1. In an action by a tax payer of the town of A., to have certain bonds issued by said town adjudged illegal and void, it appeared that the town, acting in supposed accordance with statutory provisions (Chap. 907, Laws of 1869, as amended by chap. 925, Laws of 1871) issued its bonds to pay for stock of a railroad corporation, which passed into the hands of innocent holders. The bonds were claimed by the town to have been illegally issued, and so invalid. While suits were pending to enforce them, said town, under the act of 1880 (Chap. 145, Laws of 1880), authorizing it "to issue new

bonds pursuant to the provisions of chapter 75, Laws of 1878," and its amendments, to the amount and extent of its bonded indebtedness, issued the bonds in question in exchange for, and to retire the outstanding bonds, the new bonds drawing a lower rate of interest than the old ones. Said town at the time had no other "bonded indebtedness" than the original bonds issued as above stated. *Held*, that the action was not maintainable; that the town having elected to compromise rather than to contest the validity of the old bonds, was estopped from thereafter questioning it. *Hills v. Peekskill Sogs. Bk.* 490

2. The words "bonded indebtedness," as used in said acts of 1878 and 1890, are not limited to bonds in all respects legal and valid, but the acts authorize the refunding of "all municipal bonds save such as" have been adjudged invalid by the final determination of a competent court which are excluded from their operation by chapter 317, Laws of 1878. *Id.*
3. The act of 1878 first mentioned, as thus construed, is not violative of the constitutional provision (State Const., art. 8, § 11), prohibiting municipal corporations from incurring indebtedness for other than "county, city, town or village purposes." The said act does not authorize the incurring of an indebtedness, but the payment of an acknowledged debt, and the constitutional provision does not deprive such corporations of the right to compromise claims which they dispute. *Id.*
4. The defect alleged in the proceedings under which the original bonds were issued was that to the averment in the petition, that "the signers were a majority of the tax payers of the town, was not added the words 'not including those taxed for dogs or high way tax only.'" *Held*, that the defect did not render the bonds so absolutely void as matter of law, but that there might be reasonable question pending an adjudi-

cation; enough of doubt to justify the legislature in authorizing, and the town in effecting an amicable settlement. *Id.*

TRESPASS.

1. To authorize the construction of a railroad upon or over a highway, where individuals own private rights or interests therein, or in the soil thereof, not only must the public right or license be obtained, but the individual rights and interests must be lawfully acquired; and if constructed without such acquisition, the builders are trespassers and are liable for all the damages sustained by the owners of such rights and property, as to whom the railroad is a continuing nuisance. *Uline v. N. Y. C. & H. R. R. Co.* 98
2. Where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action; and it seems for any damages thereafter sustained, other actions may be brought successively until the nuisance shall be abated. The structure being a nuisance the railroad company is under legal obligation to remove it, and it is not to be presumed that it will continue it permanently. Damages, therefore, may not be awarded upon that assumption, nor will the judgment operate as a purchase of the right to have the structure remain. *Id.*
3. Accordingly *held*, that proof and an allowance as damage for the permanent diminution in the market value of plaintiff's lots was improper, conceding that the embankment was unlawfully constructed. *Id.*
4. The authorities upon the subject of the damages recoverable in actions of trespass collated and discussed. *Id.*

TRIAL.

1. *It seems* that the proper mode of trial of an action in equity is before the court without a jury, unless at the instance of the court or a party, some one or all of the issues are ordered to be tried before a jury, and for that purpose the questions by the jury should be distinctly framed. *Hammond v. Morgan.* 179
2. If the facts so determined with those admitted by the pleadings cover the whole case, motion may at once be made for judgment, upon which both parties have a right to be heard. The court may order judgment upon the case as so made, or it may set aside the findings of the jury, or use some of them, and it may allow either party to give further evidence. *Id.*
3. If motion for judgment be not at once made, it must be brought on upon motion. *Id.*
4. If the findings and admissions do not cover the whole case, the action must be regularly brought to a hearing before the court, which may adopt or reject the findings of the jury, and receive proof of other facts, and in such case the court must make findings of fact and law. (Code of Civ. Pro., §§ 968-972, 1225.) *Id.*
5. Plaintiff's complaint alleged in substance that he delivered to defendant, to be held by him in trust for plaintiff, an assignment of certain letters-patent, etc., executed to plaintiff by defendant and others, also a release from certain obligations and contracts, which papers defendant refused to deliver upon demand. Judgment was prayed directing defendant to return the papers and for damages because of the detention. The action was put by the plaintiff upon the Special Term calendar, but was stricken therefrom on motion of defendant on the ground that it was an action at law. It was then noticed by plaintiff for trial and was tried at a jury term. The jury rendered a verdict finding the title of the property in the plaintiff and that he should have the return thereof. Plaintiff thereafter on application *ex parte* to the judge who presided at the trial, obtained an order directing judgment ordering defendant forthwith to deliver to plaintiff the instruments so detained, and thereupon judgment was entered as directed. On motion to set aside the order and judgment, *held*, that considering the action, either as one in replevin or as an equitable one, the order and judgment were irregular and unauthorized; that defendant did not have a remedy by appeal from the judgment, his only remedy was by motion. *Id.*
6. The rejection of a competent juror is ground of error, although the jurors who actually try the case are competent, it is the right of a party to require that the range of selection shall not be limited by excluding without cause a competent juror from the panel. *Hildreth v. City of Troy.* 234
7. By defendant's charter (§ 16, chap. 1. Laws of 1816), it is declared that in an action to which the city is a party "no person shall be deemed an incompetent juror by reason of his being an inhabitant * * * of the said city." In an action against the city, upon impaneling the jury the plaintiff "excused" eight jurors, drawn from the regular panel, who were inhabitants of the city, on the ground that they were interested. Defendant's attorney objected. The court overruled the objection, holding that all such jurors were disqualified, to which ruling said attorney excepted. Afterward six other jurors were rejected on the same ground. *Held*, that the ruling was error, which was available to defendant on appeal (Code of Civ. Pro., § 1180), that the proceeding on the part of the plaintiff was in substance a challenge, and that the ruling in substance gave plaintiff fourteen peremptory challenges instead of the two to which he was entitled. *Id.*

8. Plaintiff boarded a train on defendant's road; when the conductor in collecting fares reached him he presented an invalid ticket, which the conductor refused to accept, and demanded fare. This plaintiff refused to pay. The conductor informed him that he would be obliged to put him off unless he paid. He replied that he would sue the company if he was put off. This occurred as the train reached a place where the track was crossed by another railroad at grade, and where, in compliance with the statute, trains on defendant's road stopped for a moment, and where passengers were in the habit of getting on and off. The conductor called for assistance, a brakeman and baggage-man came and began the removal. Plaintiff resisted and continued the struggle without cessation until he was landed on the track. When he reached the car door and again while on the platform he stated he would pay the fare. The court charged that if the train had stopped at a station, and before it started again plaintiff offered to pay his fare, any subsequent effort to remove him was unlawful and rendered defendant liable for damages. *Held* error. *Pease v. D., L. & W. R. R. Co.* 367
9. In an action of ejectment, plaintiff claimed title under a deed which she alleged had been executed and delivered to her by her mother, who afterward obtained possession thereof and destroyed it, and then deeded the land to defendant, who had full knowledge of the previous conveyance. Plaintiff proved by several witnesses that she had in her possession a deed purporting to convey the premises, to be executed under seal by her mother, and to be acknowledged before L., a justice of the peace; also that such a deed was delivered to her by her mother, and placed by her in her bureau drawer, from which it was subsequently taken by the mother and burned on account of her displeasure at her daughter's marriage. Plaintiff also proved admissions on the part of defendant that the deed in question had been executed at his suggestion, as claimed by plaintiff; that it was acknowledged before L., and that he, with full knowledge thereof, subsequently purchased the property, believing the deed did not amount to any thing, as it was not recorded and had been destroyed. *Held*, the evidence was sufficient to justify a finding by the jury that the deed to plaintiff was duly executed, acknowledged and delivered. *Simmons v. Havens.* 427
10. The rights of parties in a legal action are to be determined as they were at its commencement, unless some event happening subsequently and affecting those already in issue is presented by supplemental pleading. *Styles v. Fuller.* 622
11. Where, therefore, the answer in an action was a general denial, and defendant on the trial offered to prove that after the commencement of the action plaintiff was adjudged a bankrupt and the cause of action passed to his assignee, which offer was rejected. *Held* no error. *Id.*
12. Where items of an account or claim are numerous, and therefore difficult to be retained in the memory, the court, in its discretion, may permit a witness to refer to memoranda, proved to be correct both as to items and value. *Wise v. Phoenix Ins. Co.* 637
13. In a civil action the fact of adultery may be established by proof of such facts and circumstances, as, under the rules of evidence, are competent to be proved, and which satisfy the mind of the tribunal required to pass upon the question of the truth of the charge. It is not necessary to satisfy the mind beyond a doubt, or to lead the judgment as a necessary conclusion to the determination that adultery has been actually committed. *Allen v. Allen.* 658
14. No different standard of judgment applies to such a case from that which in ordinary transactions

guides the conclusions of intelligent and conscientious men. *Id.*

15. *It seems* that where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause; if under the testimony it is just as probable that it was caused by the one as the other, he cannot recover. *Searles v. Manhattan R. Co.* 661

—*In action for false imprisonment, when no malice was shown, the court charged that plaintiff was entitled to a fair compensation which was made up of the loss of time and the insult and humiliation put upon plaintiff by the arrest. On exception to the latter part of charge, held, it was erroneous; that it was the province of the jury to determine whether plaintiff had suffered insult or humiliation; but the charge assumed these elements of damage did exist and required the jury to assess the damages with that assumption.*

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TROY (CITY OF).

1. By defendant's charter (§ 16, chap. 1, Laws of 1816), it is declared that in an action to which the city is a party "no person shall be deemed an incompetent juror by reason of his being an inhabitant * * * of the said city." In an action against the city, upon impaneling the jury, the plaintiff "excused" eight jurors, drawn from the regular panel, who were inhabitants of the city, on the ground that they were interested. Defendant's attorney objected. The court overruled the objection, holding that all such jurors were disqualified, to which ruling said attorney excepted. Afterward six other jurors were rejected on the same ground. *Held*, that the ruling was error which was available to defendant on appeal (Code of Civ. Pro., § 1180); that the proceeding

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TRUSTS AND TRUSTEES.

1. In an action to compel a trustee to account and pay over the sum found due, and to convey to plaintiffs the trust estate, an attachment will not lie. (Code of Civ. Pro., § 635.) *Thorington v. Merrick.* 5
2. The penalty imposed by the General Manufacturing Act (§ 15, chap. 40, Laws of 1848) upon the trustees of a corporation organized under it for signing an annual report "false in any material representation" with knowledge of its falsity, is not incurred simply because of an omission from the aggregate of indebtedness of certain liabilities of the company, although this was known to the defendants at the time the report was made. *Butler v. Smalley.* 71
3. Where it appears that the report was made within the twenty days but not filed until thereafter, the inquiry is as to whether the company is in default; while the law requires the filing to be within a reasonable time after the twenty days, and this exacts prompt performance and diligent action, if the company avails itself of the usual method of performing its duty, and the performance is within a reasonable time, having regard to the nature and circumstances thereof, in the absence of any thing showing want of good faith and active diligence, the trustees are not liable. *Id.*
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ing upon all the parties, and under which he can obtain a perfect title. *Scholle v. Scholle.* 167

5. It seems the rule that a trustee may not purchase or deal in the trust property in his own behalf, does not render such a purchase void *ab origine*, but voidable only, and at the instance of the *cestui que trust* or of a party who has acquired the rights which belong to one in that relation. The title, even while in the hands of the trustee, may be confirmed as well by acquiescence and lapse of time as by the express act of the *cestui que trust*. *Harrington v. Erie Co. Sigs. Bk.* 257

6. The title of a subsequent *bona fide* purchaser for value and without notice, when there is nothing on the record to show that his grantors had not a perfect right to convey, cannot be impeached, even in equity; he takes the land freed from the trust. *Id.*

7. In an action against trustees of a manufacturing corporation to recover a debt of the corporation because of a failure to make and file a report for the year 1877, four of the defendants joined in an answer, one count of which averred that said defendants failed to make a report for the year 1878, and for each year thereafter, and that more than three years had elapsed since any penalty or claim arose against them in favor of plaintiff. The number of trustees of the corporation was not alleged. On demurrer to this count, *held*, that it was defective, in that it did not aver that defendants were trustees in 1878, or thereafter, previous to 1877; nor did it allege any default by the corporation prior to 1877, as if it was to be assumed that defendants were trustees, still it did not appear and could not be assumed that they constituted a majority of the board, and the corporate duty might have been performed without their joining in the report. *Cornell v. Rouch.* 373

8. Where a debt against such a corporation, owned by a trustee thereof,

is assigned by him absolutely for value, the assignee, on a default in making and filing a report subsequently occurring, may proceed against trustees to recover the debt, although the assignor continues to be a trustee up to the time of the default. *Id.*

9. The will of W., after directing the payment of debts and expenses, named six persons as "executors of and trustees under" it. A series of separate trust estates were constituted, running for the lives of the specified beneficiaries. Some of these required specific sums to be set apart, others provided for the severance of the trust estates from the general assets, and their management by five of the six persons so named, holding as trustees. A large portion of the trust estate consisted of real estate, and provision was made for partition. Authority was conferred upon the trustees to lease and to sell certain portions, and general authority for the management of the land. The trustees were also empowered, in their discretion, to commit, by revocable power of attorney, the management of certain of the trust estates to the beneficiary. The accounts of the executors as such were settled, leaving in their hands only the trust estates, which were severed from the general assets, and thereafter separate accounts were kept with each beneficiary. *Held*, that by the will the testator contemplated and provided for two separate duties to be performed by his representatives, first as executors, and thereafter as trustees, and that they were entitled to commissions in both capacities, but that they were not entitled to commissions on the value of the real estate unsold at the termination of the trusts. *Phaniz v. Livingston.* 451

10. The provision of the Revised Statutes (1 R. S. 678, § 55), providing for express trusts to sell lands for the benefit of creditors, does not prohibit the grantee of an insolvent debtor from executing a mortgage to secure the payment of specific debts of the grantor in pursuance of a prior oral under-

standing entered into at the time of the execution of the conveyance. *Royer Wheel Co. v. Fielding.* 504

— *When executor by retaining property bequeathed to an infant becomes liable as trustee.*
See *Davis v. Crandall.* 811

USE AND OCCUPATION.

1. To maintain an action for use and occupation of real property, it is not only necessary for plaintiff to prove title, but that the conventional relation of landlord and tenant existed between the parties. *Preston v. Hawley.* 586
2. While it is not essential to show that this relation was created by written instrument or express agreement, there must be proof of some circumstances authorizing an inference that the parties intended to assume that relationship toward each other. *Id.*
3. A vendor of real estate who remains in possession of part of the property after the conveyance does not thereby become tenant to the purchaser, and is not liable for use and occupation. *Id.*
4. *It seems* the remedy of the purchaser, if the vendor refuses to surrender the possession, is by action of ejectment alone, in which he may recover damages by way of mesne profits for the unlawful withholding of possession. *Id.*
5. In an action for use and occupation it appeared that plaintiff purchased of defendant the premises in question, consisting of a hat factory and machinery therein. After the conveyance defendant allowed certain stock used in the business, which was on the premises at the time of the sale, to remain there for about two months after the conveyance. Plaintiff demanded rent, but this defendant refused to pay, offering to pay for storage; this was about a month before he removed the stock. *Held,* that the evidence failed to show

the existence of the relation of landlord and tenant; and that the action was not maintainable. *Id.*

VILLAGES.

See *CLINTON (VILLAGE OF).*
PORT CHESTER (VILLAGE OF).

WAIVER.

In an action upon an undertaking given upon appeal, the defense was that no written notice of the entry of the order or judgment affirming the judgment appealed from was served ten days prior to the commencement of the action, as required by the Code of Civil Procedure (§ 1309); a notice was served, subscribed, and indorsed by the attorney, but the indorsement did not state his post-office address or place of business. The appellant's attorney received and retained the notice and admitted service thereof. *Held,* that a decision of the General Term to the effect that the acceptance and retention of the notice was a waiver of the irregularity was justified and was not reviewable here. *Evans v. Backer.* 289

WARRANTY.

Where an executory contract for the sale of goods is with warranty that they shall be good, sound, and all right, and equal to a sample shown, an acceptance of the goods after opportunity to examine them does not preclude the purchaser from claiming and recovering damages for breach of the warranty. *Kent v. Friedman.* 616

WHARVES.

Where the city of Brooklyn placed a public bath at plaintiffs' pier without their authority or consent, *held,* that the city was liable to pay the value of the use of the pier; and that the provisions of said charter requiring contracts for work, materials and im-

provements to be made with the lowest bidder, etc., and declaring that 'no debt or obligation of any kind shall be created by the common council against the city except by ordinance or resolution,' had no application. *Poillon v. City of Brooklyn.* 132

WILLS.

1. The will of E., after a bequest to C. of a bond and mortgage executed by James Davis, contained a bequest to J. as follows: "the sum of \$248.92, a portion of the debt due me from the said James Davis, secured by his notes;" then followed a similar gift to the plaintiff: the legatees were infant sons of Davis. At the time of the making of the will and at the time of his death, the testator held a note against said Davis for the amount of the two sums thus bequeathed. *Held*, that the gift to plaintiff was a specific legacy of one-half the note. *Davis v. Crandall.* 811
2. The will of W., after directing the payment of debts and expenses, named six persons as "executors of and trustees under" it. A series of separate trust estates were constituted, running for the

lives of the specified beneficiaries. Some of these required specific sums to be set apart, others provided for the severance of the trust estates from the general assets, and their management by five of the six persons so named, holding as trustees. A large portion of the trust estate consisted of real estate, and provision was made for partition. Authority was conferred upon the trustees to lease and to sell certain portions, and general authority for the management of the land. The trustees were also empowered, in their discretion to commit, by revocable power of attorney, the management of certain of the trust estates to the beneficiary. The accounts of the executors as such were settled, leaving in their hands only the trust estates, which were severed from the general assets, and thereafter separate accounts were kept with each beneficiary. *Held*, that by the will the testator contemplated and provided for two separate duties to be performed by his representatives, first as executors, and thereafter as trustees, and that they were entitled to commissions in both capacities, but that they were not entitled to commissions on the real estate unsold at the termination of the trusts. *Phenix v. Livingston.* 431

Ex J. W. A.



